2014

CUMULATIVE SUPPLEMENT

TO

MISSISSIPPI CODE

1972 ANNOTATED

Issued September 2014

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AND 1ST AND 2ND EXTRAORDINARY SESSIONS
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User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the Mississippi Code of 1972 Annotated, a User's Guide has been included in the main volume. This guide contains comments and information on the many features found within the Code intended to increase the usefulness of the Code to the user.

PUBLISHER'S FOREWORD

Statutes

The 2014 Supplement to the Mississippi Code of 1972 Annotated reflects the statute law of Mississippi as amended by the Mississippi Legislature through the end of the 2014 Regular Session and 1st and 2nd Extraordinary Sessions.

Annotations

Case annotations are included based on decisions of the State and federal courts in cases arising in Mississippi. Annotations to collateral research references are also included.

To better serve our customers by making our annotations more current, LexisNexis has changed the sources that are read to create annotations for this publication. Rather than waiting for cases to appear in printed reporters, we now read court decisions as they are released by the courts. A consequence of this more current reading of cases, as they are posted online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided, as they become available, through later publications.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals and decisions of the appropriate federal courts. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal 2nd
Mississippi College Law Review
Mississippi Law Journal

Finally, published opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

Amendment Notes

Amendment notes detail how the new legislation affects existing sections.

Editor's Notes

Editor's notes summarize subject matter and legislative history of repealed sections, provide information as to portions of legislative acts that have not been codified, or explain other pertinent information.

Joint Legislative Committee Notes

Joint Legislative Committee notes explain codification decisions and corrections of Code errors made by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation.

Tables

The Statutory Tables volume adds tables showing disposition of legislative acts through the 2014 Regular Session and 1st and 2nd Extraordinary Sessions.

Index

The comprehensive Index to the Mississippi Code of 1972 Annotated is replaced annually, and we welcome customer suggestions. The foreword to the Index explains our indexing principles, suggests guidelines for successful index research, and provides methods for contacting indexers.

Acknowledgements

The publisher wishes to acknowledge the cooperation and assistance rendered by the Mississippi Joint Legislative Committee on Compilation, Revision, and Publication of Legislation, as well as the offices of the Attorney General and Secretary of State, in the preparation of this supplement.

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SCHEDULE OF NEW SECTIONS

Added in this Supplement

TITLE 11. CIVIL PRACTICE AND PROCEDURE

CHAPTER 7. Practice and Procedure in Circuit Courts

IN GENERAL

CHAPTER 13. Injunctions

MISSISSIPPI CODE 1972

ANNOTATED

VOLUME THREE

TITLE 11

CIVIL PRACTICE AND PROCEDURE

CHAPTER 7

Practice and Procedure in Circuit Courts

IN GENERAL

§ 11-7-7. Transfer of chose in action after filing.

JUDICIAL DECISIONS

1. In general.

Liability for corporate debt was limited to those officers and directors who were actively involved in the control and management of the corporation, and the president's testimony at trial made it clear he was involved in the control and management of the corporation; however, where there was no proof of any assignment to the president by the corporation of any chose in action as contemplated under Miss. Code Ann. § 11-7-7, the president had no standing to pursue the action on behalf of the corporation. Consequently, although the president, individually, could have been held liable for the corpo-

rate torts committed by the corporation, he had no authority to sue on a contract that belonged to the corporation; accordingly, all claims brought by the corporation and the president were dismissed. 4 H Constr. Corp. v. Superior Boat Works, Inc., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 83183 (N.D. Miss. Sept. 11, 2009).

When a bank purchased a corporation's choses in action at a sheriff's sale, it also purchased lawsuits; as such, it became the owner of the lawsuits, and the trial court erred in not substituting the bank as a party plaintiff and in not dismissing the litigation. Citizens Nat'l Bank v. Dixieland Forest Prods., LLC, 935 So. 2d 1004 (Miss. 2006).

Trial court's denial of a church's motion to quash a writ of execution upon its chose of action against a third party was affirmed, as nothing in Miss. Code Ann. § 11-7-7 excluded writs of execution from the manner in which a chose in action could be transferred. Maranatha Faith Ctr., Inc. v. Colonial Trust Co., 904 So. 2d 1004 (Miss. 2004).

Miss. Code Ann. § 11-7-7 does not prohibit a chose in action from being subject to a writ of execution. Maranatha Faith Ctr., Inc. v. Colonial Trust Co., 904 So. 2d 1004 (Miss. 2004).

§ 11-7-12. Civil penalty recoverable for violation of bad check statute; applicability to electronic transfers of funds.

(1) If a check, draft or order is made, drawn, issued, uttered or delivered in violation of Section 97-19-55, the payee, endorser or his assignee shall be entitled to collect, in addition to the face amount of the check, draft or order, a service charge of Forty Dollars ($40.00).

(2) In any civil action founded on a check, draft or order made, drawn, issued, uttered or delivered in violation of Section 97-19-55, the plaintiff, if he be a payee, endorser, holder or assignee, shall be entitled to recover, in addition to the face amount of the check, draft or order, damages in the following amount:

(a) If the amount of the check, draft or order is up to and including Twenty-five Dollars ($25.00), then the additional damages shall be:

(i) A service charge of Thirty Dollars ($30.00); and

(ii) In the event suit is filed by a licensed attorney, reasonable attorney's fees as determined by the judge.

(b) If the amount of the check, draft or order is above Twenty-five Dollars, then the additional damages shall be:

(i) A service charge of Forty Dollars ($40.00); and

(ii) In the event suit is filed by a licensed attorney, reasonable attorney's fees as determined by the judge.

(c) The payee, endorser, holder or assignee of a check, draft or order may claim in a single civil action all checks, drafts or orders made, drawn, issued, uttered or delivered in violation of Section 97-19-55 by a single drawer without regard to venue or the identity or number of payees on those instruments.

(d) The provisions of this section shall also apply to electronic transfers of funds.

SOURCES: Laws, 1976, ch. 454; Laws, 2000, ch. 364, § 1; Laws, 2004, ch. 374, § 2; Laws, 2007, ch. 451, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment inserted "holder or assignee" preceding "shall be entitled" in (2); in (2)(a), added (ii) and divided the former first paragraph into present (a) and (a)(i) by inserting the colon following "damages shall be" and inserting "(i) A service charge of" preceding "Thirty Dollars"; rewrote (2)(b) through (2)(d); and made a minor stylistic change.

§ 11-7-13. Actions for injuries producing death.

Whenever the death of any person or of any unborn quick child shall be caused by any real, wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or whenever the death of any person or of any unborn quick child shall be caused by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person or unborn quick child for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death, and to all deaths caused by breach of warranty, either express or implied, of the purity and fitness of foods, drugs, medicines, beverages, tobacco or other articles or commodities intended for human consumption.

Any person entitled to bring a wrongful death action may assert or maintain a claim for any breach of expressed warranty or for any breach of implied warranty. A wrongful death action may be maintained or asserted for strict liability in tort or for any cause of action known to the law for which any person, corporation, legal representative or entity would be liable for damages if death had not ensued.

In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased or unborn quick child, or by all interested parties, such party or parties may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, whether an estate has been opened or not. Any amount, but only such an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. All other damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, nor wife, nor children, nor father, nor mother, nor sister, nor brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. All references in this section to children shall include descendants of a deceased child, such descendants to take the share of the deceased child by representation. There shall not be, in any case, a distinction between the kindred of the whole and half blood of equal degree. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates. The provisions of this section shall apply to illegitimate children on account of the death of the natural father and to the natural father on account of the death of the illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates, if the survivor has or establishes the right to inherit from the deceased under Section 91-1-15.

Any rights which a blood parent or parents may have under this section are hereby conferred upon and vested in an adopting parent or adopting

parents surviving their deceased adopted child, just as if the child were theirs by the full-blood and had been born to the adopting parents in lawful wedlock.

The list of persons in this section who may bring a wrongful death action is exclusive and only those persons shall be considered interested parties who are entitled to bring an action under this section.

A defendant in an action under this section is authorized within ninety (90) days of filing an answer, to request that the plaintiff initiate the process of determining heirs. Such determination must be resolved before commencement of trial.

SOURCES: Codes, 1857, ch. 61, art. 48; 1871, § 676; 1880, § 1510; 1892, § 663; 1906, § 721; Laws, 1908, ch. 167; Hemingway's 1917, § 501; Laws, 1922, ch. 229; 1930, § 510; 1942, § 1453; Laws, 1952, ch. 248; Laws, 1958, ch. 285, § 1; Laws, 1977, ch. 435; Laws, 1981, ch. 529, § 6; Laws, 1993, ch. 302, § 4; Laws, 2002, 3rd Ex Sess, ch. 4, § 11; Laws, 2004, ch. 515, § 1; Laws, 2013, ch. 548, § 1, eff from and after passage (approved Apr. 25, 2013.)

Amendment Notes — The 2013 amendment added the last two paragraphs.

JUDICIAL DECISIONS

1. In general.

In a wrongful death action under Miss. Code Ann. § 11-7-13, a motion to compel arbitration should have been granted because an arbitration agreement between a doctor and a patient agreement fell under 9 USCS § 2 since it had a nexus to interstate commerce, and there was no procedural unconscionability based on the patient's inability to read since the language was not complex, the waiver of the right to a trial was in bold and capital letters, the patient signed or initialed on several pages, and there was a time lapse between the signing and the date of a surgery. Cleveland v. Mann, 942 So. 2d 108 (Miss. 2006).

1.5. Relation to Other Laws.

A statutory heir under the descent and distribution statutes (Miss. Code Ann. §§ 91-1-1 to 91-1-11) is not necessarily a listed relative under Mississippi's wrongful death statute, Miss. Code Ann. § 11-7-13, since the listed relatives under the wrongful death statute exclude a decedent's grandparents, uncles and aunts, each of whom are included in the descent and distribution statute's definition of "statutory heir." Burley v. Douglas, 26 So. 3d 1013 (Miss. 2009), remanded by 134 So. 3d 692, 2012 Miss. LEXIS 547 (Miss. 2012).

2. Right of action generally.

Since beneficiaries could have only brought claims the decedent could have brought had the decedent survived, logic required the Mississippi Supreme Court to conclude that the converse was true, in that the decedents could not have brought claims the decedent could not have brought, had the decedent survived; therefore, where a patient signed an arbitration agreement with a doctor prior to

surgery, beneficiaries were not able to subsequently file a wrongful death action against the doctor arising out of such surgery. Cleveland v. Mann, 942 So. 2d 108 (Miss. 2006).

5. Persons entitled to sue.

An "interested party" is a person who has a relationship to the decedent that is recognized by law and who therefore has suffered a remediable injury (i.e., the invasion of a legally protected interest) by the wrongful deprivation of the decedent's life at the defendant's hands. Such a person thus may claim a genuine right of recovery from the decedent's wrongful death action by seeking damages for his or her injury, and that right gives the claimant a legally sufficient interest in the action to make him or her an interested party under the wrongful death statute. Clark Sand Co. v. Kelly, 60 So. 3d 149 (Miss. 2011).

In a wrongful death action, the trial court erred, when considering defendant's summary judgment motion, in finding that plaintiff was not the decedent's common law wife because the trial court was not permitted to make such a factual determination at the summary judgment stage. Clark Sand Co. v. Kelly, 60 So. 3d 149 (Miss. 2011).

In a wrongful death case in which a circuit court found that the deceased's girlfriend, who was also his personal representative, had standing to bring the case and a sand company filed an interlocutory appeal of the circuit court's denial of its motion for summary judgment, the girlfriend did not have standing as an interested party because, at the time she commenced the suit, she did not have a recognized-by-law relationship to the deceased. Her later appointment as executrix did not change that. Clark Sand Co. v. Kelly, — So. 3d —, 2010 Miss. LEXIS 94 (Miss. Feb. 25, 2010), opinion withdrawn by, substituted opinion at 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

In a wrongful death case in which a circuit court found that the deceased's girlfriend, who was also his personal representative, had standing to bring the case and a sand company filed an interlocutory appeal of the circuit court's denial of its motion for summary judgment, while the girlfriend referred to herself as the deceased's widow and thus argued that she had standing as such to bring this suit, that argument was without merit. She and the deceased never underwent a formal marriage ceremony, and the deceased disclaimed any marriage in his sworn 2004 deposition; the common-law marriage decree obtained after the suit was filed did not give the girlfriend standing as a listed relative to bring the action. Clark Sand Co. v. Kelly, — So. 3d —, 2010 Miss. LEXIS 94 (Miss. Feb. 25, 2010), opinion withdrawn by, substituted opinion at 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

In a wrongful death case in which a circuit court found that the deceased's girlfriend, who was also his personal representative, had standing to bring the case and a sand company filed an interlocutory appeal of the circuit court's denial of its motion for summary judgment, since, at the time she filed the suit, the girlfriend had not yet been formally appointed executrix of the deceased's estate, she did not have standing as his personal representative to bring the present action at that time. The personal representative also lacked standing as the deceased's executrix under the savings statute. Clark Sand Co. v. Kelly, — So. 3d —, 2010 Miss. LEXIS 94 (Miss. Feb. 25, 2010), opinion withdrawn by, substituted opinion at 60 So. 3d 149, 2011 Miss. LEXIS 227 (Miss. 2011).

Under Miss. Code Ann. § 11-7-13, an "interested party" may not only join a wrongful death action, but may also initiate such an action. Burley v. Douglas, 26 So. 3d 1013 (Miss. 2009), remanded by 134 So. 3d 692, 2012 Miss. LEXIS 547 (Miss. 2012).

Pursuant to Miss. Code Ann. § 11-7-13, although a grandfather did not qualify as a personal representative or a listed relative under the statute, he was an interested party under the statute because of his relationship as an inheriting heir of the deceased grandchildren, and therefore had standing to bring a wrongful death action. Burley v. Douglas, 26 So. 3d 1013 (Miss. 2009), remanded by 134 So. 3d 692, 2012 Miss. LEXIS 547 (Miss. 2012).

Dismissal of a wrongful death suit was proper because the great-nephew lacked

standing to institute a wrongful death suit under Miss. Code Ann. § 11-7-13, which conferred standing only to a decedent's spouse, parent, child, or sibling and not to distant relatives; the great-nephew also lacked standing because he was not the administrator of the decedent's estate when the wrongful death suit was commenced, and standing was to be determined as of the commencement of the action. Delta Health Group, Inc. v. Estate of Pope, 995 So. 2d 123 (Miss. 2008).

Substitution of a son as the party in a wrongful death case was improper because a patient's brother lacked standing to bring the action originally; by the time the son filed an amended complaint, the limitations period in Miss. Code Ann. § 11-7-13 had expired, and the complaint did not relate back to a nullity, and therefore dismissal was warranted. Tolliver ex rel. Wrongful Death Beneficiaries of Green v. Mladineo, 987 So. 2d 989 (Miss. Ct. App. 2007).

Where defendant nursing home filed for Chapter 11 bankruptcy protection, the trial court did not err by dismissing a wrongful death suit against the nursing home brought on behalf of a deceased patient's beneficiaries. The stipulation exempting the wrongful death suit from the bankruptcy did not name decedent's beneficiaries; they were precluded from bringing suit. Estate of Perry v. Mariner Health Care, Inc., 927 So. 2d 762 (Miss. Ct. App. 2006).

Defendants' motion for summary judgment was granted in a niece's action pursuant to Miss. Code Ann. § 11-7-13 to recover for the wrongful death of her great-uncle where (1) defendants alleged that the niece had no standing to bring the suit because she was not among the class of individuals permitted to bring a wrongful death suit by virtue of a blood relationship to the decedent and that she was not a representative of the great-uncle's estate because no estate had ever been opened; (2) in response to defendants' motion, the niece argued only that she should be permitted to amend her complaint to substitute the real party in interest; and (3) amendment could not be permitted just three weeks before trial because defendants would have been prejudiced thereby, and further, because the niece had stated that the great-uncle had no other living blood relatives, standing would still be lacking. Austin v. Mariner Health Care, Inc., 226 F.R.D. 548 (N.D. Miss. 2005).

6. Persons entitled to recover.

Trial court properly determined that a child was not a wrongful-death beneficiary of the decedent because, while the decedent signed the child's birth certificate, supported her, and participated in her life for eight years, genetic testing before his death established that he was not the child's father, the mother made no claim that the child was his heir, and the Wrongful Death Statute did not provide a cause of action for in loco children. In re Estate of Smith, 130 So. 3d 508 (Miss. 2014).

Chancery court properly divided insurance settlement proceeds equally among all the wrongful death beneficiaries, which included the decedent's three half-siblings, because with respect to priority of beneficiaries within the same class, no distinction existed between kindred of whole or half-blood. In re Estate of Eubanks, — So. 3d —, 2014 Miss. App. LEXIS 35 (Miss. Ct. App. Jan. 21, 2014).

Pursuant to Miss. Code Ann. § 11-7-13, a grandfather had standing to bring a wrongful death suit as an interested party from the moment of his grandsons' deaths, but he gained the ability to recover on behalf of the estates only after those estates came into existence and he was appointed administrator. Burley v. Douglas, 26 So. 3d 1013 (Miss. 2009), remanded by 134 So. 3d 692, 2012 Miss. LEXIS 547 (Miss. 2012).

Individual claims of loss of consortium, society and companionship, estate claims, and insurance subrogation claims (which a decedent could have brought if death had not ensued) may be recovered only by the wrongful-death beneficiaries, who share equally all such damages pursuant to Miss. Code Ann. § 11-7-13. Caves v. Yarbrough, 991 So. 2d 142 (Miss. 2008).

There was no merit to the Georgia relatives' argument that the decedent was an illegitimate child so as to preclude her father's kindred from qualifying as wrongful death beneficiaries; application of the

wrongful death statute provides that the decedent's wrongful death beneficiaries included all five of her half-siblings, as well as her mother, and even though the decedent's half-siblings on her father's side never had any contact with her, they were still statutorily entitled to their respective shares of the decedent's estate. Ray v. Ray, 963 So. 2d 20 (Miss. Ct. App. 2007).

Mississippi wrongful death statute provides for the recovery of all the wrongful death beneficiaries in a single lawsuit; thus, when any person statutorily entitled to do so files a wrongful death action, that action enures to the benefit of all parties entitled to recover for the death. Under this scheme, though a minor beneficiary would be disabled from instigating the one suit due to infancy, a personal representative of the deceased or an adult beneficiary could recover on behalf of the minor during the minor's disability. Anderson v. R & D Foods, Inc., 913 So. 2d 394 (Miss. Ct. App. 2005).

9. Limitation of actions.

Miss. Code Ann. § 11-7-13 wrongful-death claims of wrongful-death beneficiaries matured—and Miss. Code. Ann. § 15-1-49, the statute of limitations on those claims, began to run—on April 17, 2000, not because that was the day the decedent died, but rather because that was the first day ("if death had not ensued") the decedent could have brought a claim. Caves v. Yarbrough, 991 So. 2d 142 (Miss. 2008).

Mississippi wrongful-death statute, Miss. Code Ann. § 11-7-13, despite the Mississippi Legislature's assigned nomenclature, encompasses all claims, including survival claims, which could have been brought by a decedent, wrongful-death claims, estate claims, and other claims resulting from a tort which proximately caused a death. And where death is not an immediate result of the tort, the limitation periods for the various kinds of claims may not begin to run at the same time. Caves v. Yarbrough, 991 So. 2d 142 (Miss. 2008).

Under Miss. Code Ann. § 11-7-13, wrongful death claims premised on negligence, strict liability, and breach of implied warranties were time-barred under the applicable three-year limitations period of Miss. Code Ann. § 15-1-49, because the claims accrued at the time of diagnosis of the decedent's latent disease and there were no allegations of a confidential or fiduciary relationship to establish a breach of duty of disclosure of toxic substances for a fraudulent concealment claim. Wells v. Radiator Specialty Co., 413 F. Supp. 2d 778 (S.D. Miss. 2006).

10. Actions in general.

Holding that wrongful-death suit filed in Mississippi was subject to dismissal during the pendency of a suit for the same wrongful death in a sister state, pursuant to Miss. Code Ann. § 11-7-13, rested upon the wrongful-death statute's one-suit requirement and the procedural rules developed to manage wrongful-death litigation consistent with that requirement. The decision did not erode the general rule that a previously-filed action in a sister state was no bar to an action in Mississippi. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589 (Miss. 2010).

Wrongful death action against medical defendants and a casino should not have been severed because such severance violated the requirement in Miss. Code Ann. § 11-7-13 of "one suit for the same death," and was also inconsistent with Miss. Code Ann. § 85-5-7. Adams v. Baptist Mem'l Hospital-Desoto, Inc., 965 So. 2d 652 (Miss. 2007).

11. —Joinder of actions.

Trial court properly granted a joinder motion by a deceased child's father in a wrongful death action brought by the child's mother because both *Long* and the statute mandated such an outcome. Dooley v. Byrd (In re Dooley), 64 So. 3d 951 (Miss. 2011).

Mississippi wrongful death action was properly dismissed due to the pendency of a prior-filed Louisiana wrongful-death action because under Mississippi's wrongful-death statute—Miss. Code Ann. § 11-7-13—there was to be one suit for the same death; under Long v. McKinney, 897 So. 2d 160 (Miss. 2005), all claims had to be joined in that single action. Sauvage v. Meadowcrest Living Ctr., LLC, 28 So. 3d 589 (Miss. 2010).

Administratrix's negligence claims against the healthcare providers and doc-

tors was wrongful death case, and as such was a Miss. R. Civ. P. 19 compulsory joinder case and governed by Miss. Code Ann. § 11-7-13; thus, the trial court erred by transferring venue as to each doctor to separate counties, and venue for the wrongful death claim was proper in Bolivar County. Rose v. Bologna, 942 So. 2d 1287 (Miss. 2006).

In a wrongful death action, a court erred by failing to consolidate beneficiaries' separate suit filed one day after the decedent's daughter's suit because the daughter filed suit as the representative of all statutory beneficiaries, and all such beneficiaries should have received notice of the litigation. Because there was no apparent conflict of interest between appellee and the estate, and since the estate, through appellee as administratrix, employed a law firm to represent the estate, that firm should represent the estate, provided the pleadings were amended to assert a claim on behalf of the estate. Long v. McKinney, 897 So. 2d 160 (Miss. 2004).

12. —Removal of cause.

In a wrongful death case that had been removed to federal court and in which plaintiffs moved to remand, a car driver, who was a non-diverse defendant, had been improperly joined and had to be dismissed; with his dismissal the court had jurisdiction because the parties were diverse. While plaintiffs had asserted that the car driver was liable under the Mississippi Wrongful Death Statute, Miss. Code Ann. § 11-7-13, which required that all defendants be brought before the court in one suit, they had testified, under oath, that the sole cause of the accident at issue was the action of truck driver and that the car driver did not cause the accident in any way. Morris v. P & S Transp., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 17287 (N.D. Miss. Feb. 29, 2008).

15. Parties.

In a wrongful death case, the tutrix of a minor child had been misjoined under Fed. R. Civ. P. 21 because she was not an indispensable party under the Fed. R. Civ. P. 19 factors. Under Mississippi's wrongful death statute, Miss. Code Ann. § 11-7-13 (Rev. 2002), the guardian of another minor child had fiduciary obligation to other beneficiaries who were not joined in the lawsuit, and the interests of the tutrix would be represented by counsel for the guardian. Walker v. Smitty's Supply, Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 37226 (S.D. Miss. Apr. 23, 2008).

Miss. Code Ann. § 11-1-60(2)(a) instituted a cap on noneconomic damages recoverable by "the plaintiff," and under Miss. Code Ann. § 1-3-33, words written in the singular were to be read in the plural; therefore, a cap on noneconomic damages applied to all plaintiffs who brought a wrongful-death action pursuant to Miss. Code Ann. § 11-7-13. Estate of Klaus v. Vicksburg Healthcare, LLC, 972 So. 2d 555 (Miss. 2007).

Under Fed. R. Civ. P. 19(a), a widow and her children were indispensable parties to a wrongful death suit of a decedent's former wife because Miss. Code Ann. § 11-7-13 provided for a single wrongful death action that encompassed all related claims; thus, the former wife's federal suit was dismissed because the widow's presence destroyed diversity jurisdiction, but the former wife was permitted to join the widow's state court wrongful death suit. Harpster v. Thomas, 442 F. Supp. 2d 349 (S.D. Miss. 2006).

Trial court erred as a matter of law when it denied defendant equipment manufacturer's motion for summary judgment; a wrongful death claim was not assignable by a wrongful death beneficiary to one tortfeasor to be asserted against another joint tortfeasor. Mississippi's wrongful death statute did not confer upon a tortfeasor the right of assignment of a plaintiff's wrongful death cause of action. Coleman Powermate, Inc. v. Rheem Mfg. Co., 880 So. 2d 329 (Miss. 2004).

16. Evidence.

Under Miss. R. Civ. P. 50, the medical facility's motion for judgment notwithstanding the verdict should have been granted where, under Miss. Code Ann. § 11-7-13, the husband presented no evidence regarding any damages sustained from loss of society and companionship, and claims of the estate or other wrongful-death economic damages were not at issue. River Region Med. Corp. v. Patterson, 975 So. 2d 205 (Miss. 2007).

In the family's wrongful death action, the treating nurses testified that prior to vomiting, the decedent was wearing an oxygen mask, not a bi-level positive airway pressure mask (BIPAP), and that after he vomited a nurse switched him to a nasal bi-prong which provided oxygen through the nose, rather than a mask of any type. One treating nurse, testified that a patient would not aspirate with a nasal bi-prong or a standard oxygen mask; since conflicts in the evidence were to be resolved in the prevailing party's favor (in the trial court), a reasonable jury could have believed that the decedent was not wearing a BIPAP mask when he vomited, and that one issue undermined the family's position that "overwhelming evidence" established the hospital's liability. Burr v. Miss. Baptist Med. Ctr., 909 So. 2d 721 (Miss. 2005).

19.5. Attorney fees.

Because there was no evidence that the decedent's widow gave informed written consent to the representation and fee arrangement between the decedent's son and his attorney in the wrongful death action, the attorney was entitled to contingency fees based on the son-attorney contract only with respect to the son's portion of the settlement proceeds. Willing v. Benz, — So. 2d —, 2006 Miss. App. LEXIS 873 (Miss. Ct. App. Nov. 21, 2006), substituted opinion at, opinion withdrawn by 958 So. 2d 1240, 2007 Miss. App. LEXIS 191 (Miss. Ct. App. 2007).

20. Damages.

While wrongful death beneficiaries were entitled to share equally in the damages awarded to decedent's estate (funeral expenses) and those suffered by the decedent (loss of income), they were not entitled to share equally in the amount of damages awarded for loss of society and companionship; instead, each beneficiary was entitled to recover for himself any loss of society and companionship he might prove, so the court did not err by submitting a verdict form that allowed the jury to award each beneficiary separate amounts in non-economic damages. Thus the court denied the beneficiaries' motion for new trial on that ground. Bridges v. Enter. Prods. Co., 551 F. Supp. 2d 549 (S.D. Miss. 2008).

Recovery of emotional distress damages is not permitted under the Mississippi Wrongful Death Statute and damages awards cannot be enlarged on account of the horror and terrible shock of a tragedy; as photographs of the accident scene and testimony regarding the manner in which the decedent died were not relevant to the claims of loss of society or companionship, and were otherwise highly prejudicial, the court found it did not err by excluding this evidence during the second trial in this case; thus the court denied the beneficiaries motion for new trial on this ground. Bridges v. Enter. Prods. Co., 551 F. Supp. 2d 549 (S.D. Miss. 2008).

Court's charge given in a second trial that disclosed the amount awarded for funeral expenses and lost income in the first trial was necessary and reasonable in order to explain that the second trial was limited to the beneficiaries' claims for non-economic damages as the issues of liability and economic loss had already been decided; additionally, beneficiaries failed to show that the charge affected their substantial rights. Accordingly, the court did not err by disclosing the amount of damages awarded in the first trial in its charge to the jury during the second trial of this case an a new trial was not warranted. Bridges v. Enter. Prods. Co., 551 F. Supp. 2d 549 (S.D. Miss. 2008).

21. —Elements of damages.

Survival claims described in Miss. Code Ann. § 11-7-13, the wrongful-death statute, are, by specific statutory language, limited to damages which a deceased person could have pursued if death had not ensued. Caves v. Yarbrough, 991 So. 2d 142 (Miss. 2008).

22. —Measure of damages.

In a personal injury products liability lawsuit, an award of damages to the decedent's estate was not inflammatory because, considering the actual damages and the testimony of the decedent's mother as to the family's loss of society and companionship of a young son and brother on the verge of manhood, and the pain and suffering that he must have experienced between the time of the tire's

rupture when he was alive and when the rolling automobile stopped against a tree and he was dead, the jury's award was proper. There was evidence to support the damages, and the jury award to the estate was not based upon hedonic damages. Goodyear Tire & Rubber Co. v. Kirby, 2009 Miss. App. LEXIS 221 (Miss. Ct. App. Apr. 21, 2009), appeal dismissed by, writ of certiorari dismissed by 36 So. 3d 455, 2010 Miss. LEXIS 327 (Miss. 2010).

25. Compromise, settlement and release.

On a petition by a decedent's husband to pay over escrow funds, a chancery court properly held that remaining settlement proceeds in a wrongful death action were wrongful death proceeds because Mississippi courts regularly distributed the proceeds of wrongful death settlements to the wrongful death beneficiaries; an antenuptial agreement between the decedent and her husband had no bearing on the settlement of the wrongful death claim. In re Estate of Burns, 31 So. 3d 1227 (Miss. Ct. App. 2009), writ of certiorari denied by 31 So. 3d 1217, 2010 Miss. LEXIS 176 (Miss. 2010).

27. Unborn child.

From Miss. Code Ann. § 11-7-13 it was clear that in order for a father to be entitled to proceeds from a wrongful death action for an illegitimate child, he had to establish his right to inherit from the child under Miss. Code Ann. § 91-1-15, which included the § 91-1-15(3)(d)(i) requirements; therefore, the father's argument was without merit where the father made no effort to be a parent to the child, suffered no loss as a result of the child's demise, and any part of the settlement received by the father and his kindred could only have been termed a windfall and unjust enrichment. Williams v. Farmer, 876 So. 2d 300 (Miss. 2004).

30. Jurisdiction.

Dismissal of a wrongful death suit against a hospital was error because, although an earlier wrongful death suit arising from the same incident had been filed against a nursing home, that suit had been dismissed by the time the motion to dismiss was addressed by the trial court, thus it was null and void, and the second suit against the hospital was the only suit pending for Miss. Code Ann. § 11-7-13 purposes. Briere v. S. Cent. Reg'l Med. Ctr., 3 So. 3d 126 (Miss. 2009).

The first court to properly take jurisdiction of a wrongful death action in Mississippi courts shall, so long as that action is pending, have exclusive jurisdiction, and any other subsequently filed action for the same death shall be of no effect. Long v. McKinney, 897 So. 2d 160 (Miss. 2004).

31. Collateral source rule.

In a wrongful death action, none of the attorneys or witnesses discussed which particular bills Medicare paid, and the hospital made no attempt to persuade the jury that payments from Medicare should have served to reduce the amount of damages awarded. Consequently, the collateral source rule did not apply; additionally, since the decedent's widow mentioned Medicare in her direct testimony and the only use of Medicare in the hospital's cross examination was to clear up the amount of lost monthly income, the trial judge did not abuse his discretion in allowing said testimony. Burr v. Miss. Baptist Med. Ctr., 909 So. 2d 721 (Miss. 2005).

RESEARCH REFERENCES

Law Reviews. Sleeping Double in a Single Bed — Personal Consumption in Wrongful Death, 25 Miss. C. L. Rev. 159, Spring, 2006.

Comment: "I'm Not Dead Yet!": An Analysis of the Recent Supreme Court of Mississippi's Wrongful Death Jurisprudence, 27 Miss. C. L. Rev. 235, 2007/2008.

§ 11-7-15. Contributory negligence no bar to recovery of damages; jury may reduce damages.

JUDICIAL DECISIONS

2. Construction and application, generally.

In a negligence case, an owner's motion for a new trial under Miss. R. Civ. P. 59 should have been granted because the evidence showed the owner did not exercise substantial control over a worksite, despite having control over safety and specifying a daily or hourly rate; moreover, it was undisputed that the injured party's actions were negligent for comparative negligence purposes. Coho Res., Inc. v. Chapman, 913 So. 2d 899 (Miss. 2005).

3. Contributory negligence in general.

Trial court erred in granting private contractors summary judgment on the basis that a widow's wrongful death claim would require it to question military decisions because they failed to show that adjudication of a ballistic wall's failure would implicate a political question; the contractors did not show that they would put forward a viable contributory negligence defense because the claim that the wall failed could stand without implicating a decision committed to the military's discretion. Ghane v. Mid-South Inst. of Self Def. Shooting, Inc., 137 So. 3d 212 (Miss. 2014).

Motel guests who sustained damages as victims of an armed robbery at the motel did not have a duty to mitigate their damages by abiding by the robbers' demands and, therefore, the trial court did not abuse its discretion in denying the motel owners' request for a comparative negligence jury instruction. Intown Lessee Assocs., LLC v. Howard, 67 So. 3d 711 (Miss. June 30, 2011).

Where an injured motorist, who was experiencing chest discomfort, pulled his vehicle partly off the highway, but partly obstructed the right-hand lane of travel in violation of Miss. Code Ann. § 63-3-903, the motorist's act was a proximate and contributing cause an accident, and the trial court did not err by allowing the jury to apportion fault. Meka v. Grant Plumbing & Air Conditioning Co., 67 So. 3d 18 (Miss. Ct. App. June 28, 2011).

Mississippi law does not require apportionment of fault, Miss. Code. Ann. § 85-5-7(1), (7), to a plaintiff absent evidence sufficient to show, at least, negligence on the plaintiff's part, Miss. Code. Ann. § 11-7-15. Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP, 542 F.3d 475 (5th Cir. 2008).

Summary judgment in favor of a landlord was proper because under Miss. Code Ann. § 11-7-15, the tenant's familiarity with the condition of the slick surface of the carport which caused her to fall and break her ankle constituted contributory negligence, and the landlord could not be contributorily negligent for a condition of which he was unaware. Dulin v. Sowell, 919 So. 2d 1010 (Miss. Ct. App. 2005).

7. Evidence.

In a product liability suit, evidence of plaintiff's alcohol and drug use before riding an all-terrain vehicle (ATV), even though he was not legally intoxicated when he was hurt in an ATV accident, was not subject to exclusion on a motion in limine because it was relevant to the issue of contributory negligence under Miss. Code Ann. § 11-7-15. Fife v. Polaris Indus., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 9882 (S.D. Miss. Jan. 15, 2008).

Where an employee was mounting a moving locomotive when a foot slipped due to mud, causing employee to fall and sustain serious leg injuries, the railroad was liable to the employee for damages; the trial court did not err by refusing to

instruct the jury on comparative negligence under Miss. Code Ann. § 11-7-15, and the jury's rejection of the claim was not against the weight of the evidence, and while the employee testified that employee did not check his boots prior to mounting the locomotive, the employee also testified on acting in compliance with the railroad's safety rules. Canadian Nat'l/Ill. Cent. R.R. v. Hall, 953 So. 2d 1084 (Miss. 2007).

Court's finding of contributory negligence on the part of plaintiff was proper where defendant bus driver testified that he came to a complete stop at the stop sign, he looked both ways for oncoming traffic before entering the intersection, both parties had a clear unobstructed view of the intersection as they approached from their respective directions, and defendant's bus was hit by plaintiff's truck, thus indicating a lack of evasive action on the part of plaintiff. Thompson ex rel. Thompson v. Lee County Sch. Dist., 925 So. 2d 57 (Miss. 2006).

9. Instructions.

Finding against the operator in an action for negligence brought by the driver and passenger was proper because a jury instruction improperly stated that even if the jury found that the operator's speed was excessive and that the excessive speed was the proximate cause of the accident, that the operator could avoid culpability due to the intervening negligence of another person. Denham v. Holmes, 60 So. 3d 773 (Miss. 2011).

Denial of a driver and passenger's motion for a new trial in their negligence action after the jury found in favor of the other driver was improper because the driver and passenger were denied their right to a fair trial. In part, Mississippi was a pure comparative-negligence state and because a jury instruction implied contributory negligence, it was a misstatement of the law and was potentially misleading to the jury. Denham v. Holmes, 60 So. 3d 803 (Miss. Ct. App. 2010), affirmed by, remanded by 60 So. 3d 773, 2011 Miss. LEXIS 192 (Miss. 2011).

In a suicide wrongful death case against a doctor, plaintiff waived her claim that the court should have given the jury an apportionment instruction due to the fact that the doctor put forth evidence that the decedent's husband and other family members caused the decedent to commit suicide because plaintiff stated in a discovery response that no heir had exacerbated the decedent's mental illness, and plaintiff provided no other theory as to how an heir could be held partially responsible for the suicide. Young v. Guild, — So. 2d —, 2008 Miss. LEXIS 548 (Miss. Oct. 30, 2008), substituted opinion at, opinion withdrawn by 7 So. 3d 251, 2009 Miss. LEXIS 193 (Miss. 2009).

10. — Peremptory instruction.

Where a car collision was caused when the driver of a commercial vehicle swerved to avoid hitting an unknown driver, reasonable minds could have differed as to liability, and the jury's verdict for defendant driver and his employer was supported by substantial evidence; the trial court erred by granting the plaintiff a new trial and ordering that the new jury be peremptorily instructed that defendant driver was negligent as a matter of law. White v. Stewman, 932 So. 2d 27 (Miss. 2006).

RESEARCH REFERENCES

ALR. Contributory negligence and assumption of rish in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow. 20 A.L.R.4th 517.

§ 11-7-17. Questions of negligence and contributory negligence for jury.

JUDICIAL DECISIONS

1. In general.
4. Contributory negligence.

1. In general.

Jury verdict defied all logic, as the evidence presented at trial established that the driver was negligent as a matter of law for failing to maintain a proper lookout and to yield the right-of-way by executing a turn across the insured's lane of travel. A verdict should have been returned in favor of the insured because the violation of said statutory duties by the driver was the unequivocal proximate cause of the insured's injury; even if the driver was not negligent per se, the facts presented at trial unconditionally demonstrated that the collision was the result of her negligence and the trial court committed reversible error in failing to apply Miss. R. Civ. P. 50, and by denying the insured's motion for judgment notwithstanding the verdict. State Farm Auto Ins. Cos. v. Davis, 887 So. 2d 192 (Miss. Ct. App. 2004).

4. Contributory negligence.

In a product liability suit, evidence of plaintiff's alcohol and drug use before riding an all-terrain vehicle (ATV), even though he was not legally intoxicated when he was hurt in an ATV accident, was not subject to exclusion on a motion in limine because it was relevant to the issue of contributory negligence, which was a jury question under Miss. Code Ann. § 11-7-17. Fife v. Polaris Indus., Inc., — F. Supp. 2d —, 2008 U.S. Dist. LEXIS 9882 (S.D. Miss. Jan. 15, 2008).

§ 11-7-18. Limitation of remedies or disclaimer of liability as to certain implied warranties in sale to consumer of consumer goods prohibited.

Except as otherwise provided in Sections 75-2-314, 75-2-315 and 75-2-719, there shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose in a sale to a consumer, as defined in Section 75-1-201(b) (11), of consumer goods, as defined in Section 75-9-102(a)(23). The provisions of this section may not be waived or varied by agreement.

SOURCES: Laws, 1976, ch. 385, § 3; Laws, 1998, ch. 513, § 5; Laws, 2010, ch. 506, § 1; Laws, 2014, ch. 312, § 5, eff from and after July 1, 2014.

Amendment Notes — The 2010 amendment added "in a sale to a consumer...75-9-102(a)(23)" in the first sentence; and added the last sentence.

The 2014 amendment deleted "75-2-315.1" following "Sections 75-2-314, 75-2-315" in the first sentence.

JUDICIAL DECISIONS

1. In general.
2. Preservation for review.

1. In general.

Miss. Code Ann. § 75-2-315.1 [repealed] is specifically excepted from the non-disclaimer statute, Miss. Code Ann. § 11-7-18; this fact, together with a plain reading of Miss. Code Ann. § 75-2-315.1 itself, makes abundantly clear that the Mississippi Legislature intends to permit the

disclaimer of implied warranties in contracts for the sale of late-model used vehicles. Therefore, a buyer's act of signing an "as is" agreement when purchasing a used vehicle was sufficient to waive these warranties. Murray v. Blackwell, 966 So. 2d 901 (Miss. Ct. App. 2007).

2. Preservation for review.

Grant of summary judgment in favor of a window manufacturer and seller in the homeowners' action against them concerning leaking windows was appropriate because the homeowners' warranty claims were procedurally barred. The homeowners never, over the course of filing three complaints, pleaded claims for breach of implied or express warranty against the seller and that critical fact fundamentally distinguished the case from the warranty decisions relied upon by the homeowners. McKee v. Bowers Window & Door Co., 64 So. 3d 926 (Miss. 2011).

§ 11-7-20. Privity unnecessary to maintain actions in negligence, strict liability or breach of warranty.

JUDICIAL DECISIONS

1. In general.
2. Flood zone determinations.

1. In general.

Because a plaintiff who is injured due to a breach of warranty may recover from each seller of the individual product which caused the injury (so long as the product was defective when each respective seller possessed it), and because privity is not a requirement for negligence, strict liability or breach of warranty, plaintiff's negligence and breach of warranty claims against defendant manufacturer survived a motion to dismiss. Tellus Operating Group, L.L.C. v. R & D Pipe Co., 377 F. Supp. 2d 604 (S.D. Miss. July 19, 2005).

2. Flood zone determinations.

In a case in which a home owner sued a flood zone determination company because of an erroneous flood zone determination, the company had not shown its entitlement to summary judgment as was granted by the district court. While the home owner had not ordered the determination, privity was not the issue; the proper inquiry was whether it was reasonably foreseeable that she would receive and rely on the report and whether the company could have reasonably foreseen that the owner would rely on the flood determination, not whether she was a member of a limited group for whose benefit the determination was intended. Paul v. Landsafe Flood Determination, Inc., 550 F.3d 511 (5th Cir. 2008).

§ 11-7-147. Opening statements allowed.

JUDICIAL DECISIONS

1. In general.

On the inmate's petition for post-conviction relief, the court held that counsel was not ineffective for failing to give an opening statement because opening statements were not mandatory under Miss. Code Ann. § 11-7-147. Spicer v. State, 973 So. 2d 184 (Miss. 2007).

§ 11-7-155. Judge not to sum up or comment on testimony or charge jury.

JUDICIAL DECISIONS

14. Comment on evidence.

In a personal injury case, the court's jury instructions did not improperly comment on the evidence because nothing in the judge's explanation indicated anything about how the judge felt that the jury should rule, nor was the judge's comment "tantamount" to commenting on evidence that had been presented; the example of apportionment of fault given to the jury was simply to aid their understanding of what would happen when they rendered their verdict, and how the form of their verdict should look. Walker v. Gann, 955 So. 2d 920 (Miss. Ct. App. 2007).

§ 11-7-157. No special form of verdict required.

JUDICIAL DECISIONS

5. Illustrative cases.

Where decedent was killed in a one-car collision after a tire on his truck burst, his estate sued the manufacturer; the jury returned an interrogatory verdict showing that the jurors were divided on the defective-manufacture claim, but when polled all agreed that the condition of the tire was not the proximate cause of decedent's death. The trial court did not err in denying the estate's motion for a new trial; the jury substantially complied with the law in rendering the verdict, as required by Miss. Code Ann. § 11-7-157. Oliver v. Goodyear Tire & Rubber Co., 10 So. 3d 976 (Miss. Ct. App. 2009).

§ 11-7-161. If verdict not responsive, jury to deliberate further.

JUDICIAL DECISIONS

1. In general.

Where decedent was killed in a one-car collision after a tire on his truck burst, his estate sued the manufacturer; the jury returned an interrogatory verdict showing that jurors were divided on the defective-manufacture claim, but when polled all agreed that the condition of the tire was not the proximate cause of decedent's death. The jury substantially complied with the law in rendering the verdict; the trial court was not required to send the jury back for further deliberations pursuant to Miss. Code Ann. § 11-7-161. Oliver v. Goodyear Tire & Rubber Co., 10 So. 3d 976 (Miss. Ct. App. 2009).

Under Miss. Code Ann. § 11-7-161, the jury's verdict and apportionment of fault between the architectural firm and architect individually was ambiguous, and the circuit judge erred in not ordering the jury to return for deliberations in order to reform the verdict to determine the architect's individual liability. Lambert Cmty. Hous. Group, L.P. v. Wenzel, 987 So. 2d 468 (Miss. Ct. App. 2008).

§ 11-7-165. Award of damages in civil action against person who steals, embezzles, extorts or converts certain property of vulnerable adult; "position of trust" defined.

(1) In a civil action where it is proven that a person took property having a value of Two Hundred Fifty Dollars ($250.00) or more belonging to a vulnerable adult by conversion, embezzlement, extortion, theft or fraud without the owner's consent, or obtained the owner's consent by intimidation, deception, undue influence or by misusing a position of trust or a confidential relationship with the owner, then whether the action is to recover the property or damages in lieu thereof, or both, damages shall be recoverable up to three (3) times the amount of the monetary damages or value of the property embezzled, converted or otherwise stolen, in addition to any other damages.

(2) For purposes of this section, "position of trust" shall include, but not be limited to, a person who:

(a) Is named the attorney-in-fact in a power of attorney, whether executed before or after the adult became vulnerable;

(b) Has assumed a duty to provide care to the vulnerable adult;

(c) Is in a fiduciary relationship with the vulnerable adult, including a de facto guardian or de facto conservator; or

(d) Is a joint tenant or tenant in common with the vulnerable adult.

(3) "Vulnerable adult" shall have the meaning defined in Section 43-47-5, Mississippi Code of 1972.

(4) Civil remedies provided under this section shall be supplemental and cumulative, and not exclusive of other remedies afforded under any other law. Damages awarded under this section are remedial and not punitive, and do not limit and are not limited by any criminal action or any other provision of law. Any civil damages paid by the civil defendant shall reduce the amount such defendant, upon conviction, may be ordered to pay in restitution, and any restitution paid under a criminal penalty shall reduce any civil damages owed.

(5) The cause of action, the right to bring a cause of action, or the right to seek treble damages pursuant to this section shall not be limited or affected by the death of the owner.

SOURCES: Laws, 2007, ch. 550, § 1, eff from and after July 1, 2007.

Editor's Note — A former § 11-7-165 (Codes, Hutchinson's 1848, ch. 59, art. 1 (91); 1857, ch. 61, art. 184; 1871, § 625; 1880, § 1584; 1892, § 720; 1906, § 778; Hemingway's 1917, § 561; 1930, § 570; 1942, § 1514; Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991) provided that if the verdict omitted a price or value, the court could at any time award a writ of inquiry to ascertain the price or value.

In (1), (2)(b), (c) and (d), and (3), and in the section catchline, there are references to "vulnerable adult." Laws of 2010, ch. 357, amended the name of the "Vulnerable Adults Act," codified at § 43-47-1 et seq., to be the "Vulnerable Persons Act."

§ 11-7-167. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-167. [Codes, 1857, ch. 61, art. 181; 1871, § 622; 1880, § 1727; 1892, § 746; 1906, § 808; Hemingway's 1917, § 596; 1930, § 600; 1942, § 1544]

Editor's Note — Former § 11-7-167 listed defects that would not stay or reverse a judgment after verdict.

§ 11-7-189. Enrollment of judgments; satisfaction.

JUDICIAL DECISIONS

1. In general.
2. Date lien attaches.
4. Priority.

1. In general.

Judgment debtor requested that a circuit court cancel a judgment, but the circuit court properly ruled that it lacked jurisdiction to do so, and moreover only the judgment creditor had the authority to remove the judgment from the county's rolls; the circuit court had merely entered an order that accepted a letter of credit instead of a supersedeas bond, and that order did not affect the underlying judgment. Fitch v. Valentine, 946 So. 2d 780 (Miss. 2007).

2. Date lien attaches.

Pursuant to Miss. Code Ann. § 11-7-189(1), a transfer of property occurred when a transferee's state court judgment against a debtor was enrolled in the county Judgment Roll, the date of which was well outside the 90-day period found in 11 U.S.C.S. § 547(b)(4)(A); thus, it was not preferential. Studdard v. Pitts (In re Studdard), — Bankr. —, 2007 Bankr. LEXIS 2693 (Bankr. S.D. Miss. Aug. 2, 2007).

4. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, under the order of priority of the filing of the judgment creditors' liens under Miss. Code Ann. §§ 11-7-189, 11-7-191, 11-7-195, 11-7-197, the wife was first in priority, the appraiser was second, the attorney was third, and the bank was last. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

§ 11-7-191. Enrolled judgment as lien.

JUDICIAL DECISIONS

1. In general.
3. Property subject to lien.
6. Priority.

1. In general.

Judgment debtor requested that a circuit court cancel a judgment, but the circuit court properly ruled that it lacked jurisdiction to do so, and moreover only the judgment creditor had the authority to remove the judgment from the county's rolls; the circuit court had merely entered an order that accepted a letter of credit instead of a supersedeas bond, and that order did not affect the underlying judgment. Fitch v. Valentine, 946 So. 2d 780 (Miss. 2007).

Where a chancery court found in favor of the purchaser of a warranty timber deed in a breach of contract action in which it was determined that the seller of the deed did not have legal title to the land, the chancery court erred in denying the purchaser a judgment lien on the property pursuant to Miss. Code Ann. § 11-7-191 and Miss. Code Ann. § 11-7-

197 because the judgment constituted a lien on the property once the judgment was enrolled. Gordon v. Gordon, 929 So. 2d 981 (Miss. Ct. App. 2006).

3. Property subject to lien.

Pursuant to Miss. Code Ann. § 11-7-191, an enrolled judgment does not become a lien on money or intangible property of the judgment defendant until such time as the judgment creditor seizes the money or intangible property by way of a writ of garnishment or other appropriate writ; where a creditor claimed that it enjoyed a secured position with respect to debtor's accounts receivable by virtue of a pre-petition judgment it obtained against debtor, it did not have a perfected lien on the accounts and accounts receivable because creditor had not seized or garnished any accounts or accounts receivable of debtor. In re Rexrode, — Bankr. —, 2005 Bankr. LEXIS 915 (Bankr. N.D. Miss. May 18, 2005).

6. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, under the order of priority of the filing of the judgment creditors' liens under Miss. Code Ann. §§ 11-7-189, 11-7-191, 11-7-195, 11-7-197, the wife was first in priority, the appraiser was second, the attorney was third, and the bank was last. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

§ 11-7-193. How priority of lien forfeited.

JUDICIAL DECISIONS

1. In general.

In a dispute between cross-defendants, three judgment creditors, as to priority of their liens, where the debtor's ex-wife filed her lien first, an appraiser filed his lien second, and the ex-wife's attorney filed his last, because the attorney did not provide statutory notice to the appraiser, he could not supplant the wife's lien under Miss. Code Ann. § 11-7-193 for her alleged failure to execute after the attorney sent her such notification; the judgment liens had priority in order of filing. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

§ 11-7-195. Judgment not a lien out of county unless enrolled.

JUDICIAL DECISIONS

3. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, under the order of priority of the filing of the judgment creditors' liens under Miss. Code Ann. §§ 11-7-189, 11-7-191, 11-7-195, 11-7-197, the wife was first in priority, the appraiser was second, the attorney was third, and the bank was last. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

§ 11-7-197. Judgment not a lien in county until enrolled.

JUDICIAL DECISIONS

1. In general.
3. Priority.

1. In general.

Where a chancery court found in favor of the purchaser of a warranty timber deed in a breach of contract action in which it was determined that the seller of the deed did not have legal title to the land, the chancery court erred in denying the purchaser a judgment lien on the property pursuant to Miss. Code Ann. § 11-7-191 and Miss. Code Ann. § 11-7-197 because the judgment constituted a lien on the property once the judgment was enrolled. Gordon v. Gordon, 929 So. 2d 981 (Miss. Ct. App. 2006).

3. Priority.

Cross-defendant refinancing bank was not entitled to equitable subrogation to step into the original lender's shoes for priority over four cross-defendant judgment creditors because the property was in the debtor/borrower's infant daughter's name until the day of closing and if the bank had inquired of liens under the debtor's name, the judgment creditors' liens would have been found, thus, under the order of priority of the filing of the judgment creditors' liens under Miss. Code Ann. §§ 11-7-189, 11-7-191, 11-7-195, 11-7-197, the wife was first in priority, the appraiser was second, the attorney was third, and the bank was last. Shavers v. JPMorgan Chase Bank, N.A. (In re Shavers), 418 B.R. 589 (Bankr. S.D. Miss. 2009).

§ 11-7-211. Bills of exception may be amended.

JUDICIAL DECISIONS

2. Illustrative cases.

Where, in response to appellant's motion to supplement the record, a school board filed an amended bill of exceptions, although appellant had only three days' notice of the proposed amendment, its motion to strike the amended bill was properly denied because any deficiency in notice did not affect its substantial rights. Rod Cooke Constr. Co. v. Lamar County Sch. Bd., 135 So. 3d 902 (Miss. Ct. App. 2013), writ of certiorari denied by 136 So. 3d 437, 2014 Miss. LEXIS 204 (Miss. 2014).

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS

§ 11-7-305. Affidavit of filing; notice; execution.

JUDICIAL DECISIONS

1. In general.

Doctor enrolled the New Mexico judgment on March 3, 1999, and the clerk mailed notice of the enrollment on that date, and the attorney then had 20 days to contest the enrollment of the judgment; where the attorney's response was filed on April 28, 1999, outside the 20-day limit, the attorney's defenses to the enrollment which alleged false representations by the doctor were not properly before the trial court. Schwartz v. Hynum, 933 So. 2d 1039 (Miss. Ct. App. 2006).

CHAPTER 9

Practice and Procedure in County Courts and Justice Courts

ARTICLE 3.

JUSTICE COURTS.

§ 11-9-107. Service of process by sheriff or constable.

Cross References — Payment to county chancery clerk of fees collected for serving process or writ issued in different county, see § 9-11-20.

ATTORNEY GENERAL OPINIONS

There is no statutory provision allowing for private process servers within the state of Mississippi other than in an emergency situation. Process in criminal matters must be served by a constable or sheriff or sheriff's deputy. Subpoenas may be served by private process servers. Huckaby, Aug. 25, 2006, A.G. Op. 06-0378.

§ 11-9-109. Person appointed to execute process.

ATTORNEY GENERAL OPINIONS

There is no statutory provision allowing for private process servers within the state of Mississippi other than in an emergency situation. Process in criminal matters must be served by a constable or sheriff or sheriff's deputy. Subpoenas may be served by private process servers. Huckaby, Aug. 25, 2006, A.G. Op. 06-0378.

§ 11-9-143. Trial by jury.

ATTORNEY GENERAL OPINIONS

Either party in a civil case in justice court is entitled to a jury trial. Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

The cost of a jury trial for a civil case in justice court is not one that is contemplated to be paid in advance under § 9-11-10. As a general rule, the losing party in a civil case bears the burden of all court costs, however, the judge has some discretion is assessing the costs. Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

The "return day of the process" as set forth in this section means the day the case is set for trial. Further, a justice court may refuse a request for a jury trial if a party fails to request a jury trial "on or before the return day of the process". Shirley, Apr. 30, 2004, A.G. Op. 04-0181.

A criminal warrant does not have a return date. However, if a defendant's bond is made returnable to a plea date, such a date would constitute the return day of process. If a defendant pleads not guilty on the plea date, the court should inquire if the defendant demands a jury trial. If the bond is returnable to a trial date, the trial date is considered the return day of process and the defendant could demand a jury trial at any time until the trial begins. Hood, Sept. 17, 2004, A.G. Op. 04-0455.

CHAPTER 11

Venue of Actions

IN GENERAL

§ 11-11-3. County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.

JUDICIAL DECISIONS

2. Construction and application generally.

Plaintiff could not establish venue in Hinds County pursuant to any basis provided for in Miss. Code Ann. § 11-11-3(1)(a)(i) for the following reasons: (1) defendant, resided in Rankin County at the time of the accident; (2) the insurance company's principal place of business was outside of Mississippi; (3) the communications received in Hinds County by plaintiff between himself and the insurance company were not sufficient to show that a substantial alleged act or omission occurred in Hinds County; and (4) the accident, which occurred in Rankin County, was "a substantial event that caused the injury. Holmes v. McMillan, 21 So. 3d 614 (Miss. 2009).

In a contractor's action against a subcontractor, because there was a resident defendant, the subcontractor, venue was proper only in a county where the resident defendant lived or where the cause of action occurred. Thus the trial court abused its discretion in denying a change of venue and misinterpreted Miss. Code Ann. §§ 11-11-3 and 11-11-7 because Miss. Code Ann. § 11-11-3 was mandatory and Miss. Code Ann. § 11-11-7 was permissive Capital City Ins. Co. v. G.B. 'Boots' Smith Corp., 889 So. 2d 505 (Miss. 2004).

4. Venue where defendant resides or is found.

Appeal of a prisoner's jail-time credit grievance, brought in the Lowndes County Circuit Court, was properly dismissed for improper venue because: (1) if the motion had been for post-conviction relief, jurisdiction would have been proper in Lowndes County because that was where the prisoner's conviction had been obtained; (2) however, the motion was not for post-conviction relief; (3) rather, the prisoner was appealing the decision of an administrative agency, and as a result, jurisdiction was proper in the county where the defendant resided, which in the case at hand was Marion County, the prisoner's county of incarceration. Stokes v. State, 984 So. 2d 1089 (Miss. Ct. App. 2008).

Inmate's claim that applying Miss. Code Ann. § 47-5-138.1 constituted an ex post facto law was improperly dismissed for improper venue where the inmate only took issue with whether the inmate was entitled to trusty earned time, venue was governed by Miss. Code Ann. § 11-11-3(a), and where the action was filed in the county where the inmate was incarcerated at a facility where two prison officials worked and the actions that denied the inmate trusty earned time occurred. Horton v. Epps, 966 So. 2d 839 (Miss. Ct. App.

2007), remanded by 20 So. 3d 24, 2009 Miss. App. LEXIS 210 (Miss. Ct. App. 2009).

Change of venue should have been granted because the mandatory language of the general venue statute of former Miss. Code Ann. § 11-11-3 controlled over the permissive language of former Miss. Code Ann. § 11-11-11 so that plaintiffs were not entitled to establish venue in their county of residence when a resident defendant was a party to the negligence suit; Miss. R. Civ. P. 82(c) did not establish venue in plaintiffs' county of residence, and venue was determined from the date of original filing so that the dismissal of the resident defendant did not cure or correct improper venue where the alleged slip and fall and negligent medical treatment occurred in another county. Crenshaw v. Roman, 942 So. 2d 806 (Miss. 2006).

Venue in a personal injury action was improper in Hinds County because a defendant, who resided in Hinds County, was improperly joined as he was not present at the skating rink when the accident took place, he was not responsible for supervising public sessions, and he had no duty to discourage high speed skating. Park on Lakeland Drive, Inc. v. Spence, 941 So. 2d 203 (Miss. 2006).

Trial court erred in dismissing for lack of jurisdiction an inmate's suit against prison employees that challenged the earned time credit on his armed robbery sentence because contrary to the holding of the trial court, the matter was not in the nature of postconviction relief. Because the inmate was suing the employees of the prison, venue was appropriate in the county where the prison was located. Guy v. State, 915 So. 2d 508 (Miss. Ct. App. 2005).

Where plaintiff, a resident of Claiborne County, Mississippi, sued two nonresident defendants and a doctor who resided in Warren County, Mississippi, Miss. Code Ann. § 11-11-3(1) (Supp. 2001) dictated that Warren County was the only county of appropriate venue because it was the only county in Mississippi in which a defendant (the doctor) resided. The permissive language of the statute—"may also be commenced in the county in which the plaintiff resides"—applied only where there was no resident defendant. Namihira v. Bailey, 891 So. 2d 831 (Miss. 2005).

Both Miss. R. Civ. P. 82(e) and Miss. Code Ann. § 11-11-3(4)(a) required the transfer of a case brought by a resident of Claiborne County, Mississippi, against a doctor, who resided in Warren County, Mississippi, and two nonresident defendants to county of proper venue—i.e., Warren County—where the reason for the transfer was the inability to seat an impartial jury. Warren County was the only county of appropriate venue because it was the only county in Mississippi in which a defendant (the doctor) resided. Namihira v. Bailey, 891 So. 2d 831 (Miss. 2005).

4.5 Venue where acts or substantial event occurred.

It was error to deny insureds' motion to transfer venue to Smith County in an insurer's action disputing coverage, as the insurer failed to provide sufficient facts to show that venue was proper in Rankin County because there was no "significant act or omission" or "substantial event causing injury" there; the insureds resided in Smith County, the accident happened there, and any misrepresentations in the policy occurred in Covington County. Wood v. Safeway Ins. Co., 114 So. 3d 714 (Miss. 2013).

Pursuant to Miss. Code Ann. § 11-11-3, venue was proper only in Rankin County on the beneficiary's claim against the insurer for benefits because the insurer's agents resided in Rankin County and the beneficiary was in Smith County only when he was informed of the denial of benefits, which was insufficient to establish venue. Am. Family Life Assur. of Columbus v. Ellison, 4 So. 3d 1049 (Miss. 2009).

Because "substantial alleged acts," as well as "a substantial event that caused injury" occurred in plaintiff renters' choice of venue, i.e., their personal property was damaged there and the acts upon which they based their tort claims took place there, venue was proper in the county of their choice as it was one of four choices laid out under Miss. Code Ann. § 11-11-3(1)(a)(I) and the trial court erred in

transferring the case. Hedgepeth v. Johnson, 975 So. 2d 235 (Miss. 2008).

5. Venue as to corporations.

6. —Where cause of action occurs or accrues.

Trial court did not abuse its discretion in transferring venue to Clarke County, Mississippi pursuant to Miss. Code Ann. § 11-11-3 because a company was a nonresident defendant; thus, venue was appropriate in Clarke County because the substantial alleged act or substantial event causing the injury occurred there, and the subcontractor sought a scheduling order and a trial setting in Clarke County. Reeves v. Midcontinent Express Pipeline, LLC, 119 So. 3d 1097 (Miss. Ct. App. 2013).

In a wrongful death action, a trial court did not err in transferring a hospital and other medical defendants to the county where the hospital was located because under Miss. Code Ann. § 11-11-3(3), the only proper venue for a suit against medical providers was the county in which the alleged act or omission occurred; the presence of medical providers in the action rendered inapplicable the more general venue provision of Miss. Code Ann. § 11-11-3(1)(a)(i). Adams v. Baptist Mem'l Hospital-Desoto, Inc., 965 So. 2d 652 (Miss. 2007).

In a doctor's action against a medical malpractice insurer for the insurer's decision not to renew the doctor's medical malpractice insurance, because it was the insurer's decision not to renew the insurance policy that was the alleged cause of the doctor's injuries, every substantial act, omission, or injury-causing event occurred in the county where the insurer was located and made the decision, and venue under Miss. Code Ann. § 11-11-3 was proper in that county; therefore, the chancery court improperly granted, pursuant to Miss. R. Civ. P. 60(b)(6), the doctor's motion to reconsider the chancery court's original order transferring the case to the proper county, as there were no extraordinary circumstances compelling relief from the original order. Medical Assur. Co. v. Myers, 956 So. 2d 213 (Miss. 2007).

Consumer's alleged injury did not occur or accrue in Smith County; thus, under Miss. Code Ann. § 11-11-3, venue was proper in Wayne County as that was the point of origin of her claim against the pharmaceutical companies, and the performance and interpretation of an echocardiogram in Smith County was not sufficient as to constitute substantial component of the claim. Am. Home Prods. Corp. v. Sumlin, 942 So. 2d 766 (Miss. 2006).

In the former clients' malpractice action against the attorney who represented them in prior Phen-Fen litigation, the clients claimed that the attorney and his assistant induced them into signing a release and accepting an unfavorable settlement by misrepresentations, and they relied upon conversations, visits, and correspondence carried out or received in Kemper County, the county of their residence. Therefore the trial court correctly applied the applicable venue statute, Miss. Code Ann. § 11-11-3(1), in concluding that the clients were afforded the right to choose among permissible venues and that there choice of venue had to be sustained where there was credible evidence suggesting that the former clients' causes of action accrued and/or occurred in Kemper County such that venue was proper therein. Williamson v. Edmonds, 880 So. 2d 310 (Miss. 2004).

7. —Foreign corporations.

Parent company of an alcohol permit holder should have been dismissed from a personal injury case because it was not liable under Miss. Code Ann. § 67-1-83 since it was not a permit holder itself or an employee of such; moreover, the pleadings did not adequately state a claim showing that the corporate veil should have been pierced. Penn Nat'l Gaming, Inc. v. Ratliff, 954 So. 2d 427 (Miss. 2007).

Because parent company was a foreign corporation with its principal place of business in Pennsylvania, the only place where it could be said to reside in Mississippi was where an agent for service of process may be found; thus, because the family failed to plead fact sufficient to state a claim against the parent company, their claim was unreasonable and the trial court erred in denying the motion to

transfer venue, as there was no reasonable basis to keep the parent company in the suit. Penn Nat'l Gaming v. Ratliff, — So. 2d —, 2007 Miss. LEXIS 1 (Miss. Jan. 4, 2007), opinion withdrawn by, substituted opinion at, remanded by 954 So. 2d 427, 2007 Miss. LEXIS 229 (Miss. 2007).

Where an accident occurred in Jefferson County, the insured, a Jefferson County resident, had purchased insurance from an agency located in Adams County, but the book of insurance and the agency were transferred to a different agent, in Warren County, and the insurer's registered agent for process was in Rankin County, and but for the accident in Jefferson County, no injury would have occurred and no suit would have been filed. While venue was not improper in the other counties, and while the action was for fraudulent and negligent misrepresentation and bad faith, the trial court erred in concluding that venue was not proper in Jefferson County as a substantial component of the claim, personal injury and property damage, occurred there. Snyder v. Logan, 905 So. 2d 531 (Miss. 2005).

11. Change of venue in general.

Since a chancery court erred in relying upon facts to support its denial of a motion to transfer venue which, even if taken as true, were neither alleged in the complaint nor supported by cognizable evidence, it improperly denied a motion to transfer venue. Wilkerson v. Goss, 113 So. 3d 544 (Miss. 2013).

In a medical malpractice/wrongful death action, the trial court properly denied one physician's motion to change venue because under Miss. Code Ann. § 11-11-3, venue was proper in the county in which the parents filed their action, as that was the county in which their son died. Bullock v. Lott, 964 So. 2d 1119 (Miss. 2007).

Factual basis on which the patient and husband based their medical malpractice claim against Jefferson County Hospital failed to evidence a causal connection between the hospital's alleged negligence and the patient's injury; therefore, the circuit court erred in denying the healthcare providers' and physician's motion to transfer venue to Warren County under Miss. Code Ann. § 11-11-3. Austin v. Wells, 919 So. 2d 961 (Miss. 2006).

Miss. Code Ann. § 11-11-3 was not designed to remove a resident defendant's right to be sued in his or her own county of residence as the Legislature never intended an interpretation of the venue statutes that would allow a resident defendant to be sued in the plaintiff's county of residence simply because a nonresident defendant was joined in the same suit; the hospital was a Mississippi corporation with its principal place of business in De Soto County and the patient was treated at the hospital in De Soto County when he received the alleged negligent care and treatment; therefore, venue was proper in De Soto County and should have been transferred to that county. Baptist Mem. Hospital-Desoto, Inc. v. Bailey, 919 So. 2d 1 (Miss. 2005).

Trial court erred in denying defendants' motion for a change of venue pursuant to Miss. Code Ann. § 11-11-3 in the injured motorist's action because the motorist's co-worker was fraudulently joined as a defendant to obtain venue in Smith County. The motorist's exclusive remedy against the co-worker was for workers' compensation benefits as provided under Miss. Code Ann. § 71-3-9, which extended immunity to co-workers as well as employers. Christian v. McDonald, 907 So. 2d 286 (Miss. 2005).

Pharmaceutical companies argued that the plaintiffs took the prescription drug at different times, under different labels and warnings and had different pre-existing conditions. Because of those differences, said companies sought to have plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation will be wholly distinct in each plaintiff's case; the Mississippi Supreme Court concluded a jury could well be overwhelmed by the 30 separate fact patterns that were offered to prove medical malpractice, affirmed the trial court's decision to sever plaintiffs' claims, and affirmed the trial court's decision allowing for transfer of the claims of those plaintiffs without jurisdiction in Jefferson County to the court or courts of plaintiffs' counsel's choosing. Culbert v.

Johnson & Johnson, 883 So. 2d 550 (Miss. 2004).

In an open accounts collection case, venue was proper in either Jones County or Pike County, Mississippi. Workers from the welding company, which sought monies owed, were dispatched from its Jones County offices to work at the drilling company's oil well site in Pike county, based upon orders that were placed via telephone from Pike County to Jones County, some charges were in fact incurred in Jones County, such as employees' travel time, and the welding company had expected payment in Jones County; thus, the drilling company's motion for a change of venue to Pike County was properly denied. Braswell v. T & T Welding, Inc., 883 So. 2d 82 (Miss. 2004).

15. —Waiver.

Because the doctors waited three years to pursue their motion contesting venue under former Miss. Code Ann. § 11-11-3, and in doing so, waiting until two weeks before the date set for trial, they waived their right to contest venue. Fredericks v. Malouf, — So. 3d —, 2011 Miss. LEXIS 131 (Miss. Mar. 3, 2011), opinion withdrawn by, substituted opinion at 82 So. 3d 579, 2012 Miss. LEXIS 23 (Miss. 2012).

RESEARCH REFERENCES

Law Reviews. Tort Reform and the Medical Liability Insurance Crisis in Mississippi: Diagnosing the Disease and Prescribing a Remedy, 22 Miss. C. L. Rev. 9, Fall, 2002.

Checking Up On the Medical Malpractice Liability Insurance Crisis in Mississippi: Are Additional Tort Reforms the Cure?, 73 Miss. L.J. 1001 (2004).

Now Open for Business: The Transformation of Mississippi's Legal Climate, 24 Miss. C. L. Rev. 393, Spring, 2005.

Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

§§ 11-11-11 and 11-11-13. Repealed.

RESEARCH REFERENCES

Law Reviews. Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms, 26 Miss. C. L. Rev. 253, 2006/2007.

§ 11-11-17. Where court has jurisdiction of subject matter but not venue.

JUDICIAL DECISIONS

1. In general.

Pharmaceutical companies argued that the plaintiffs took the prescription drug at different times, under different labels and warnings and had different pre-existing conditions. Because of those differences, said companies sought to have plaintiffs' joinder in Jefferson County severed, alleging that the inquiries into alleged defective design, failure to warn, breach of warranty and misrepresentation would be wholly distinct in each plaintiff's case; the Mississippi Supreme Court concluded a jury could well be overwhelmed by the 30 separate fact patterns that were offered to prove medical malpractice, affirmed the trial court's decision to sever plaintiffs' claims, and affirmed the trial court's decision allowing for transfer of the claims of those plaintiffs without jurisdiction in Jefferson County to the court or courts of plaintiffs' counsel's choosing. Culbert v. Johnson & Johnson, 883 So. 2d 550 (Miss. 2004).

CHANGE OF VENUE

§ 11-11-51. Grounds for change of venue, generally.

JUDICIAL DECISIONS

1. In general.
3. Specific grounds.
4. —Prejudice.
6. Forum non conveniens.

1. In general.

While the state supreme court held that Miss. Code Ann. § 11-11-51 did not require a company to produce an affidavit from a county resident in its motion to change venue stating that the company could not receive a fair trial, the denial of the motion was affirmed as no evidence existed that the company could not receive a fair trial. Bayer Corp. v. Reed, 932 So. 2d 786 (Miss. 2006).

3. Specific grounds.

4. —Prejudice.

In a negligence action, the subject newspaper was the primary newspaper in the county and also had a large circulation outside the county, and the front page article went into graphic detail, describing the mother's bleeding and her terror as she waited for emergency care and the article went on to allege that the hospital was responsible for the newborn child's severe brain damage. The article also explained specific acts of negligence, as claimed by the parents and cited the substance of certain deposition testimony given by hospital personnel; the appellate court held there existed a substantial likelihood of material prejudice against the hospital and that the trial court erred in denying its motion for a change of venue. River Oaks Health Sys. v. Steptoe-Finley, — So. 2d —, 2004 Miss. LEXIS 1503 (Miss. July 13, 2004).

In a products liability case arising from use of a prescription drug, the trial court abused its discretion by improperly changing venue to Claiborne County because the record was replete with evidence that defendant drug company sufficiently proved bias in the community of Claiborne County. Therefore, although the trial court correctly found that it was proper to change venue from Jefferson County, Claiborne County was not a proper venue in which a fair trial could be conducted. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004), modified and rehearing denied by 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004).

6. Forum non conveniens.

Miss. R. Civ. P. 82(e) and Miss. Code Ann. § 11-11-3(4)(a) required the transfer of a case brought by a resident of Claiborne County, Mississippi, against a doctor, who resided in Warren County, Mississippi, and two nonresident defendants to a county of proper venue—i.e., Warren County—where the reason for the transfer was the inability to seat an impartial jury; Warren County was the only county of appropriate venue because it was the only county in Mississippi in which a defendant (the doctor) resided. Thus, it was not necessary to determine whether such a transfer would have been "convenient" pursuant to Miss. Code Ann. § 11-11-51. Namihira v. Bailey, 891 So. 2d 831 (Miss. 2005).

§ 11-11-57. Venue changed but once.

JUDICIAL DECISIONS

1. Change of venue.

In a products liability case arising from use of a prescription drug, the trial court abused its discretion by improperly changing venue to Claiborne County because the record was replete with evidence that defendant drug company had sufficiently proved bias in the community

of Claiborne County. Therefore, although the trial court correctly found that it was proper to change venue from Jefferson County, Claiborne County was not a proper venue in which a fair trial could be conducted. Janssen Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31 (Miss. 2004), modified and rehearing denied by 2004 Miss. LEXIS 1002 (Miss. Aug. 5, 2004).

CHAPTER 13

Injunctions

§ 11-13-41. Victims of stalking and sexual assault exempt from payment of fees related to filing for injunctive relief.

(1) A victim of stalking, as defined in Section 97-3-107, or sexual assault, as defined in Section 97-3-65 or 97-3-95, who files an action seeking injunctive relief preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to the victim against the perpetrator of that offense, shall not be assessed any fees related to the filing of such request, the issuance of any process of court or the issuance of any order providing such protection.

(2) The court, upon issuing any such relief, shall assess costs of court to the perpetrator of the offense. In the event the court determines the request is frivolous, the court shall assess the costs of court to the petitioner.

SOURCES: Laws, 2009, ch. 412, § 1, eff from and after passage (approved Mar. 20, 2009.)

Cross References — Waiver of filing fees for petition to seek relief in domestic abuse cases, see § 93-21-7.

CHAPTER 15

Arbitration and Award

IN GENERAL

§ 11-15-1. Who may submit to arbitration.

JUDICIAL DECISIONS

1. In general.

Law client's fee dispute with a law firm that had previously represented her was subject to arbitration pursuant to Miss. Code Ann. § 11-15-1 where the legal services contracts contained arbitration clauses that were valid and enforceable, the fee dispute was within the scope of arbitration, and there was no procedural unconscionability or other legal constraint

that precluded enforcement of the arbitration clause. Slater-Moore v. Goeldner, 113 So. 3d 521 (Miss. 2013).

§ 11-15-21. Confirmation of award by court.

JUDICIAL DECISIONS

1. In general.

Employer was entitled to confirmation of an arbitration award and for entry of a judgment against a former employee because the employee's failure to file an action to vacate the arbitration award in a timely manner barred the employee's opposition to the motion. Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137 (Miss. Ct. App. 2013).

§ 11-15-23. Vacation of award; grounds.

JUDICIAL DECISIONS

1. In general.
2. Specific grounds for vacating award.
4. Contractual expansion of appeal rights.

1. In general.

Circuit judge committed reversible error by denying an employer's motion to confirm an arbitration award and for entry of a judgment because the arbitration award did not fall under any of the four instances that would have allowed the award to be vacated. Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137 (Miss. Ct. App. 2013).

2. Specific grounds for vacating award.

Mississippi's statute governing judicial review of arbitrator's decisions, Miss. Code Ann. § 11-15-23 (Rev. 2004), leaves no room for the application of the Doctrine of Manifest Disregard; even if the arbitrator mistakenly refused to consider parol evidence of a term of a settlement agreement, such error was insufficient to constitute undue means or an exceeding of the arbitrator's powers as required by § 11-15-23. Robinson v. Henne, 115 So. 3d 797 (Miss. 2013).

Chancellor erred in setting aside an arbitration award because, although undue means and unresolved issues could be valid reasons for setting aside an award, the chancellor's order failed to articulate any "undue means" utilized or any specific deficiencies with the arbitrators' thorough analysis and valuation methods. Bailey Brake Farms, Inc. v. Trout, 116 So. 3d 1064 (Miss. 2013).

Because the valuation was an arbitration award, as contemplated by the legally valid and binding contract, it was binding on the parties absent very narrow circumstances which were prescribed by Miss. Code Ann. § 11-15-23, and long standing Mississippi jurisprudence provided that every reasonable presumption would be indulged in favor of the validity of arbitration proceedings. Although the chancellor cited "undue means" and an incomplete award as justifications for judicial review, he provided insufficient explanation for those conclusions, which the court found were unsupported by the record; therefore, because the chancery court was without the authority to set aside the arbitrators' decision, the chancery court's judgment was reversed and the court reinstated the arbitration award. Bailey Brake Farms, Inc. v. Trout, — So. 3d —, 2013 Miss. LEXIS 51 (Miss. Feb. 28, 2013), opinion withdrawn by, substituted opinion at 2013 Miss. LEXIS 308 (Miss. May 23, 2013).

4. Contractual expansion of appeal rights.

Where defendant former client argued that an arbitration agreement with plaintiff law firm was unenforceable as being illusory, in that it provided for an appeal

of the arbitrators' decision to the same extent that a Mississippi county court jury verdict could be appealed, and argued that under Miss. Code Ann. § 11-15-23 parties adversely affected by an arbitration decision did not enjoy the same appeal rights as an appeal of a jury verdict, because the court believed that the Mississippi Supreme Court would allow a contractual expansion of the right to appeal the arbitration award, the arbitration agreement was not unenforceable due to the expanded appeal rights. Speetjens v. Larson, 401 F. Supp. 2d 600 (S.D. Miss. 2005).

§ 11-15-27. Motion to vacate or modify award; when made.

JUDICIAL DECISIONS

1. In general.

Employer was entitled to confirmation of an arbitration award and for entry of a judgment against a former employee because the employee's failure to file an action to vacate the arbitration award in a timely manner barred the employee's opposition to the motion. Wells Fargo Advisors, LLC v. Runnels, 126 So. 3d 137 (Miss. Ct. App. 2013).

ARBITRATION OF CONTROVERSIES ARISING FROM CONSTRUCTION CONTRACTS AND RELATED AGREEMENTS

§ 11-15-101. Agreements to which arbitration provisions apply.

JUDICIAL DECISIONS

1. In general.

Following trial court's 1994 order of dismissal without prejudice and order to submit claims to arbitration in accordance with the provisions of Miss. Code Ann. § 11-15-101 et seq., subcontractor could have initiated the arbitration proceeding but chose not to until seven years later when its claims were time-barred under Miss. Code Ann. § 15-1-49. Haycraft v. Mid-State Constr. Co., 915 So. 2d 1117 (Miss. Ct. App. 2005).

RESEARCH REFERENCES

Law Reviews. A Review of Mississippi Law Regarding Arbitration, 76 Miss. L.J. 1007, Spring, 2007.

§ 11-15-105. Application for order to proceed with arbitration; stay; determination of issues.

JUDICIAL DECISIONS

1. In relation to limitations periods.

Following trial court's 1994 order of dismissal without prejudice and order to submit claims to arbitration in accordance with the provisions of Miss. Code Ann. § 11-15-101 et seq., subcontractor could have initiated the arbitration proceeding but chose not to until seven years later when its claims were time-barred under Miss. Code Ann. § 15-1-49. Haycraft v. Mid-State Constr. Co., 915 So. 2d 1117 (Miss. Ct. App. 2005).

§ 11-15-107. Initiation of arbitration.

JUDICIAL DECISIONS

1. In relation to limitations periods.

Following trial court's 1994 order of dismissal without prejudice and order to submit claims to arbitration in accordance with the provisions of Miss. Code Ann. § 11-15-101 et seq., subcontractor could have initiated the arbitration proceeding but chose not to until seven years later when its claims were time-barred under Miss. Code Ann. § 15-1-49. Haycraft v. Mid-State Constr. Co., 915 So. 2d 1117 (Miss. Ct. App. 2005).

§ 11-15-125. Confirmation of award by court.

JUDICIAL DECISIONS

0.5 Award confirmed.

According to Miss. Code Ann. § 11-15-125 and Miss. Code Ann. § 11-15-135, an arbitration award would be confirmed absent the existence of at least one of the grounds listed for vacating, modifying, or correcting an award; because the subcontractor did not assert any of these grounds in its response asserting that the motion to confirm was premature, its motion to set aside judgment, motion to vacate, or motion to reconsider, the circuit court properly confirmed the award in favor of the general contractor. Johnson Land Co. v. C. E. Frazier Constr. Co., 925 So. 2d 80 (Miss. 2006).

§ 11-15-133. Vacating arbitration award.

JUDICIAL DECISIONS

1. In general.
2. Request to vacate properly denied.

1. In general.

According to Miss. Code Ann. Section 11-15-133(2), even a party challenging an award predicated upon fraud, corruption, or other undue means, had only ninety days to do so, starting from the date the fraud, corruption, or other undue means was known or should have been known; it was easy to envision the negative effects the subcontractor's interpretation of the statute could have on the benefits of arbitration, if a trial court must wait ninety days, in every case, before confirming the award. Johnson Land Co. v. C. E. Frazier Constr. Co., 925 So. 2d 80 (Miss. 2006).

2. Request to vacate properly denied.

Denial of a contractor's motion to vacate an arbitration award for a builder under Miss. Code Ann. § 11-15-133(1) was proper as: (1) the arbitrator properly refused to postpone the arbitration hearing after the contractor obtained new counsel because the contractor had already caused substantial delay in the proceedings; (2) three separate scheduling hearings were held prior to arbitration due to the contractor's failure to cooperate: (3) obtaining new counsel merely five days before arbitration was scheduled was yet another effort by the contractor to further delay the proceedings; and (4) the arbitrator was well within his authority to exclude the documentary evidence due to the contractor's failure to present the evidence in a timely manner. Tri County Contrs., Inc. v. Better Quality Builders, LLC, 111 So. 3d 1285 (Miss. Ct. App. 2013).

§ 11-15-135. Application for modification or correction of award; grounds; joinder with application for vacating award.

JUDICIAL DECISIONS

2. Modification denied.

According to Miss. Code Ann. § 11-15-125 and Miss. Code Ann. § 11-15-135, an arbitration award would be confirmed absent the existence of at least one of the grounds listed for vacating, modifying, or correcting an award; because the subcontractor did not assert any of these grounds in its response asserting that the motion to confirm was premature, its motion to set aside judgment, motion to vacate, or motion to reconsider, the circuit court properly confirmed the award in favor of the general contractor. Johnson Land Co. v. C. E. Frazier Constr. Co., 925 So. 2d 80 (Miss. 2006).

CHAPTER 17

Suits to Confirm Title or Interest and to Remove Clouds on Title

§ 11-17-31. Removing clouds upon titles.

JUDICIAL DECISIONS

3. Right and propriety of action.
10. Relief granted.

3. Right and propriety of action.

Chancellor properly denied a motion to dismiss filed by a mother and her daughter because the brother's action to set aside the sister's deed, remove the cloud on his title, and to quiet title to the disputed property was governed by the 10-year statutes of limitations where the daughter knew about the brother's deed, the brother was a remainderman who did not yet have the present right to possess the property, and the brother had a present cause of action. Lott v. Saulters, 133 So. 3d 794 (Miss. 2014).

10. Relief granted.

In a case where a husband was seeking a partition under Miss. Code Ann. § 11-21-11, the issue of whether he was a proper titleholder to a residence was waived because he did not appeal a portion of a decision requiring the removal of his name from a warranty deed; at any rate, the wife was able to prove that there was a unilateral mistake made due to the husband's fraudulent misrepresentations about their remarriage. The husband only lived in the new house for a few weeks, and he did not contribute to its upkeep. Thweatt v. Thweatt, 4 So. 3d 1085 (Miss. Ct. App. 2009).

§ 11-17-35. Title of complainant must be deraigned—and decrees, in certain cases, recorded as deeds.

JUDICIAL DECISIONS

2. Necessity of deraigning title.

Even if it were true that a chancellor erred in excluding deeds from a property owner's predecessors in a boundary line dispute case, the error was harmless because the deeds were not relevant as the chancellor ultimately relied on a survey. Mize v. Westbrook Constr. Co. of Oxford, LLC, — So. 3d —, 2013 Miss. App. LEXIS 432 (Miss. Ct. App. July 16, 2013).

Judgment was properly awarded to plaintiffs in their suit against defendants

for encroachment on their property where nothing in defendants' motion for a new trial indicated that the chancery court erred in not requiring a deraignment of title, or in ruling the way it did in the absence of a deraignment of title; no Miss. R. Civ. P. 12(e) motion was ever filed to request that plaintiffs deraign their title. Crosswhite v. Golmon, 939 So. 2d 831 (Miss. Ct. App. 2006).

CHAPTER 21

Partition of Property

REALTY

§ 11-21-1. Partition by agreement and by arbitration; partition of homestead property.

(1) Partition of land held by adult joint tenants, tenants in common, and coparceners, may be made by agreement, which shall be evidenced by a writing, signed by the parties, and containing a description of the particular part allotted to each, and recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be binding and conclusive on the parties. They may also bind themselves by written agreement to submit the partition to the arbitrament of one or more persons to be chosen by them, and to abide the partition made by the arbitrators and the articles of submission; and the written award shall be recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be final and conclusive between the parties, unless made or procured by fraud.

(2) Homestead property exempted from execution that is owned by spouses shall be subject to partition pursuant to the provisions of this section only, and not otherwise.

SOURCES: Codes, 1857, ch. 36, art. 48; 1871, § 1839; 1880, § 2552; 1892, § 3096; 1906, § 3520; Hemingway's 1917, § 2832; 1930, § 2919; 1942, § 960; Laws, 2009, ch. 517, § 1, eff from and after July 1, 2009.

Editor's Note — Laws of 2009, ch. 517, § 2, provides:

"SECTION 2. This act shall take effect and be in force from and after July 1, 2009, and shall apply to all cases pending or filed on or after July 1, 2009."

Amendment Notes — The 2009 amendment added (2); and designated the former provisions of the section as (1).

JUDICIAL DECISIONS

2. Partition by chancery decree.
3. Public policy.

2. Partition by chancery decree.

Section relation to partition of land prohibits the partition of spousal homestead property by chancery decree because the phrase "homestead property exempt from execution" is not intended to bring specific limitations on creditors' rights to other statutes. Therefore, a chancery court could not enter a partition of land owned by spouses as joint tenants with a right of survivorship. Noone v. Noone, 127 So. 3d 193 (Miss. 2013).

3. Public policy.

Mississippi Supreme Court did not have the power to declare that section dealing with a chancery court's lack of power to enter a partition by order for spouses was against the public policy favoring the alienability of land because it only had the power of judicial review. Noone v. Noone, 127 So. 3d 193 (Miss. 2013).

§ 11-21-3. Partition by decree of chancery court.

JUDICIAL DECISIONS

1. In general.
2. Title or interest necessary; parties.

1. In general.

Denial of the husband's request to partition real property jointly titled to him and his former wife was appropriate because the absence of a termination provision meant that no termination of the terms was intended. Therefore, partitioning the property would have been in violation of the intent of the Agreement and Property Settlement between the parties. Hawkins v. Hawkins, 45 So. 3d 1212 (Miss. Ct. App. 2010), writ of certiorari denied by 49 So. 3d 636, 2010 Miss. LEXIS 549 (Miss. 2010).

Partition under Miss. Code Ann. § 11-21-3 was granted to a former wife where a former husband conveyed his one-half interest in a martial residence to his new wife, but retained a life estate; this use and occupancy of the property was contrary to the terms of the divorce decree. Mosby v. Mosby, 962 So. 2d 119 (Miss. Ct. App. 2007).

2. Title or interest necessary; parties.

Section relation to partition of land prohibits the partition of spousal homestead property by chancery decree because the phrase "homestead property exempt from execution" is not intended to bring specific limitations on creditors' rights to other statutes. Therefore, a chancery court could not enter a partition of land owned by spouses as joint tenants with a right of survivorship. Noone v. Noone, 127 So. 3d 193 (Miss. 2013).

§ 11-21-9. Controverted title and all equities disposed of.

JUDICIAL DECISIONS

1. Generally.
2. Rights of parties.
3. Title issue waived.

1. Generally.

Award of the entire purchase price of a home to one of the unmarried joint tenants (JT1) was appropriate given that the chancellor could adjust the equities and determine the claims of the joint tenants and the fact that JT1 had paid the entire purchase price for the home along with the cost of all utilities, insurance, club dues, and taxes while JT2 had paid nothing. Jones v. Graphia, 95 So. 3d 751 (Miss. Ct. App. 2012).

2. Rights of parties.

Chancery court did not err in determining a sister was not entitled to recover a setoff for rent on a home she co-owned

with her brother in which the brother lived because the sister had not previously sought rent from her brother when she was not living in the house, but the brother was entitled to a setoff for the house expenses the sister had not paid after she moved out; the sister had paid house expenses from the time she acquired the home with her brother until she moved out. Stennis v. Stennis, 109 So. 3d 1107 (Miss. Ct. App. 2013).

Where real property had approximately 300 co-tenants and the property was partitioned by sale, it was not error to approve a contract of sale to a purchasing co-tenant and to split the proceeds from the sale in proportionate shares to the owners of the property. Cathey v. McPhail & Assocs., 989 So. 2d 494 (Miss. Ct. App. 2008).

3. Title issue waived.

In a case where a husband was seeking a partition under Miss. Code Ann. § 11-21-11, the issue of whether he was a proper titleholder to a residence was waived because he did not appeal a portion of a decision requiring the removal of his name from a warranty deed; at any rate, the wife was able to prove that there was a unilateral mistake made due to the husband's fraudulent misrepresentations about their remarriage. The husband only lived in the new house for a few weeks, and he did not contribute to its upkeep. Thweatt v. Thweatt, 4 So. 3d 1085 (Miss. Ct. App. 2009).

§ 11-21-11. Court may order sale in first instance.

JUDICIAL DECISIONS

1. Generally.
6. Miscellaneous.

1. Generally.

Trial court was presented with affirmative proof that a partition by sale under Miss. Code Ann. § 11-21-11 was in the best interests of the parties and thus the trial court did not err by ordering the property to be sold and dividing the proceeds equally between appellants and appellee as co-tenants; an expert on real estate appraisals testified that it was his opinion that the properties were to be sold rather than being partitioned in kind, the court found no error in the appraisal of the properties and believed that the trial court did not abuse its discretion in relying on the report, and the trial court did not rely solely on the appraisal, but also considered the parties' recommendations and did not abuse its discretion in assigning more weight to the expert's opinion. Georgian v. Harrington, 990 So. 2d 813 (Miss. Ct. App. 2008).

Defendant's argument that a judicial sale was invalid because the special master did not subscribe to the oath in Miss. Code Ann. § 11-21-17 was rejected because the oath prescribed in § 11-21-17 applied only to the three masters appointed to conduct a partition in kind pursuant to Miss. Code Ann. § 11-21-15. Dunaway v. Morgan, 918 So. 2d 872 (Miss. Ct. App. 2006).

6. Miscellaneous.

Neither Miss. Code Ann. § 11-21-11, nor its companion Miss. Code Ann. § 11-21-27, mandates that an appraisal must be obtained prior to selling partitioned land, but rather, in both statutes, the trial court may cause an appraisal to be made of the property; so clearly chancellors are vested with discretionary authority over whether to require an appraisal. Pride v. Pride, 60 So. 3d 208 (Miss. Ct. App. 2011).

Siblings waived any objection to the chancery court's failure to require that an appraisal take place before the auction of a homesite because they never raised the issue of appraisal in the chancery court; the parties stipulated on the record to the procedure for partition by sale, and the chancellor adopted the procedure requested by the parties. Pride v. Pride, 60 So. 3d 208 (Miss. Ct. App. 2011).

Siblings argument that the chancery court erred by not following the requirements of Miss. Code Ann. § 11-21-11 in ordering the sale of a homesite was procedurally barred because the siblings made

absolutely no protest; the siblings neither objected to the commissioners' report recommending a partition in kind of the land nor to the chancery court's decision to partition the homesite by sale, and in their reply brief, they conceded that they agreed with the decision to partition the homesite by sale. Pride v. Pride, 60 So. 3d 208 (Miss. Ct. App. 2011).

In a partition action, the chancery court did not abuse its discretion in ordering that the property be sold and that the proceeds from the sale be divided equally among the parties because appellant received a copy of the appraisal, was aware of the time and place of the public sale, and was aware of the right to appear and bid on the property. Polk v. Jones, 20 So. 3d 710 (Miss. Ct. App. 2009).

In a case where a husband was seeking a partition under Miss. Code Ann. § 11-21-11, the issue of whether he was a proper titleholder to a residence was waived because he did not appeal a portion of a decision requiring the removal of his name from a warranty deed; at any rate, the wife was able to prove that there was a unilateral mistake made due to the husband's fraudulent misrepresentations about their remarriage. The husband only lived in the new house for a few weeks, and he did not contribute to its upkeep. Thweatt v. Thweatt, 4 So. 3d 1085 (Miss. Ct. App. 2009).

Where real property had approximately 300 co-tenants, it was not error to order the partition by sale of the property, rather than partition in kind, because (1) the property had different types of terrain, (2) the property lacked access, (3) there were a large number of individual interests, and (4) there was no way to cover existing expenses other than by sale of the property. Cathey v. McPhail & Assocs., 989 So. 2d 494 (Miss. Ct. App. 2008).

§ 11-21-15. Judgment appointing masters.

If the judgment is for a partition of the land, it shall state the number of shares into which the land is to be divided, and shall appoint not more than three (3) discreet freeholders, not related to the parties by consanguinity or affinity, to make partition according to the judgment. Either party may object to any master for cause, and, in case the objection is sustained, the place shall be filled by another appointment. If any vacancy occurs among the masters, the chancellor may fill the vacancy at any time by written appointment.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 2 (2); 1857, ch. 36, art. 51; 1871, § 1819; 1880, §§ 2560, 2561; 1892, § 3103; 1906, § 3327; Hemingway's 1917, § 2839; 1930, § 2926; 1942, § 967; Laws, 1958, ch. 259; Laws, 1991, ch. 573, § 53; Laws, 2014, ch. 413, § 1, eff from and after July 1, 2014.

Amendment Notes — The 2014 amendment substituted "is for a partition" for "be for a partition" and inserted "not more than" in the first sentence; substituted "is sustained" for "be sustained" in the second sentence, and substituted "occurs" for "occur" and "the vacancy" for "such vacancy" in the last sentence.

JUDICIAL DECISIONS

1. Generally.

Defendant's argument that a judicial sale was invalid because the special master did not subscribe to the oath in Miss. Code Ann. § 11-21-17 was rejected because the oath prescribed in § 11-21-17 applied only to the three masters appointed to conduct a partition in kind pursuant to Miss. Code Ann. § 11-21-15 and the sale here was conducted pursuant to Miss. Code Ann. 11-21-11. Dunaway v. Morgan, 918 So. 2d 872 (Miss. Ct. App. 2006).

§ 11-21-17. Oath of special commissioners.

JUDICIAL DECISIONS

1. Oath.

Defendant's argument that a judicial sale was invalid because the special master did not subscribe to the oath in Miss. Code Ann. § 11-21-17 was rejected because the oath prescribed in § 11-21-17 applied only to the three masters appointed to conduct a partition in kind pursuant to Miss. Code Ann. § 11-21-15. Dunaway v. Morgan, 918 So. 2d 872 (Miss. Ct. App. 2006).

§ 11-21-25. Report of special commissioners.

JUDICIAL DECISIONS

1. In general.

In a long, complicated dispute among decedent's eight heirs as to how to divide decedent's 50 acres of property, the chancellor did not err in rejecting the special commissioner's third report, and in modifying the commissioner's fourth and final report. Lynn v. Lynn (In re Will of Lynn), 878 So. 2d 1052 (Miss. Ct. App. 2004).

Nothing in Miss. Code Ann. § 11-21-25 mandated conducting a hearing on objections to the special commissioners' report. Miles v. Miles, 949 So. 2d 774 (Miss. Ct. App. 2006), writ of certiorari denied by 949 So. 2d 37, 2007 Miss. LEXIS 155 (Miss. 2007).

§ 11-21-27. Land sold when not capable of division.

JUDICIAL DECISIONS

1. Appraisal.

Siblings waived any objection to the chancery court's failure to require that an appraisal take place before the auction of a homesite because they never raised the issue of appraisal in the chancery court; the parties stipulated on the record to the procedure for partition by sale, and the chancellor adopted the procedure requested by the parties. Pride v. Pride, 60 So. 3d 208 (Miss. Ct. App. 2011).

Neither Miss. Code Ann. § 11-21-11, nor its companion Miss. Code Ann. § 11-21-27, mandates that an appraisal must be obtained prior to selling partitioned land, but rather, in both statutes, the trial court may cause an appraisal to be made of the property; so clearly chancellors are vested with discretionary authority over whether to require an appraisal. Pride v. Pride, 60 So. 3d 208 (Miss. Ct. App. 2011).

§ 11-21-31. Attorney's fees.

JUDICIAL DECISIONS

3. Miscellaneous.

Because the chancery court's order for the marital house to be sold was part of the equitable distribution, the partition statutes had no applicability, and a husband was not entitled to attorney's fees under the statute. Pierce v. Pierce, 132 So. 3d 553 (Miss. 2014).

In a partition action, the chancellor's award of attorney's fees payable by the appealing parties, and assessed against the sale proceeds, was error, as there was

no evidence that said fees were reasonable and there was no bad faith shown. Further, as to notice of the sale, Miss. Code Ann. § 13-3-163 did not apply where the chancellor gave specific instruction for terms of the sale pursuant to Miss. Code Ann. §§ 11-5-93 and 11-5-95, and while the sale price was low, the chancellor did not abuse his discretion in refusing to set aside the sale. Necaise v. Ladner, 910 So. 2d 699 (Miss. Ct. App. 2005).

§ 11-21-41. Paramount rights not affected.

JUDICIAL DECISIONS

1. Right to partition.

As the owner of an undivided interest in the fee simple estate, the corporation had a legal right to partite the property in kind and to file its complaint, and the partition in kind of the property would not have affected the landowner's rights or the corporation's duties under the lease by virtue of Miss. Code Ann. § 11-21-41; therefore, as a matter of law, filing the partition suit could not have been the basis for the landowner's tort claims. Green v. Southern Landfill Mgmt., 914 So. 2d 705 (Miss. 2005).

CHAPTER 25

Unlawful Entry and Detainer

ARTICLE 1.

PROCEEDINGS BEFORE JUSTICE COURT.

§ 11-25-1. In what cases a remedy.

JUDICIAL DECISIONS

2. Foreclosure proceedings.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371 (Miss. Ct. App. 2008).

§ 11-25-31. Judgment not conclusive in another action.

JUDICIAL DECISIONS

2. Foreclosure proceedings.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371 (Miss. Ct. App. 2008).

ARTICLE 3.

PROCEEDINGS IN COUNTY COURT.

§ 11-25-101. County court; remedy in what cases.

JUDICIAL DECISIONS

9. Foreclosure proceedings.

Creditor properly brought its claim before a justice court, and then appealed to the circuit court, even though a debtor's estate was still open because creditor's action was purely a possessory action. Gandy v. Citicorp, 985 So. 2d 371 (Miss. Ct. App. 2008).

CHAPTER 27

Eminent Domain

IN GENERAL

§ 11-27-5. Complaint to condemn; parties; preference.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.

Warranty deed which was filed in the wrong judicial district was void as to a utility because the utility acquired its interest to the subject real property in a quick-take condemnation action without notice of the misfiled deed. Harrison County Util. Auth. v. Walker, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

2. Venue.

Because the landowners' claims under the Mississippi Tort Claims Act, Miss. Code Ann. §§ 11-46-1 et seq., were disposed of at summary judgment, their claim of a taking had to be brought as a separate action with venue fixed in the Circuit Court of Jackson County, the situs of the property. Dunston v. Miss. Dep't of Marine Res., 892 So. 2d 837 (Miss. Ct. App. 2005).

§ 11-27-7. Filing complaint; lis pendens; time and place of hearing; notice; pleadings.

JUDICIAL DECISIONS

1. In general.

Secretary of State had a clear interest in the property, and pursuant to Miss. Code Ann. § 7-11-11, which enumerated the duties and powers of the Secretary of State, the property was to come under the Secretary of State's charge once the redemption period was over, and this entitled the Secretary of State to be recognized in the eminent domain proceedings; if the Department of Finance and Administration had strictly followed the procedural requirements of § 11-27-7, it would have named the Secretary of State as a defendant. Smith v. Jackson State Univ., 995 So. 2d 88 (Miss. 2008).

§ 11-27-15. Dismissal; grounds; appeal.

JUDICIAL DECISIONS

1. In general.

Warranty deed which was filed in the wrong judicial district was void as to a utility because the utility acquired its interest to the subject real property in a quick-take condemnation action without notice of the misfiled deed. Harrison County Util. Auth. v. Walker, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

Dismissal of an eminent domain proceeding under Miss. Code Ann. § 11-27-15 was properly denied because two owners were unable to show that an electric association's taking was not for public use, and any incidental benefit to surrounding landowners did not defeat the taking of the owners' property; the association wanted to construct a power line to supply its customers with adequate voltage. Knight v. S. Miss. Elec. Power Ass'n, 943 So. 2d 81 (Miss. Ct. App. 2006).

§ 11-27-19. Evidence of value; award and interest.

JUDICIAL DECISIONS

1. In general.
1.1. Constitutionality.
6. View of premises.

1. In general.

Owner was properly awarded eight percent interest from the date the petition to condemn was filed, rather than from the date a law firm improperly filed a lis pendens. Lehman v. Miss. Transp. Comm'n, 127 So. 3d 277 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 658 (Miss. 2013).

In a condemnation proceeding, the trial court erred when it compounded the interest and made a distinction between pre- and post-judgment interest because the eminent domain statutory scheme provided a specific provision for interest in Miss. Code Ann. § 11-27-19, and eminent domain judgments were not based on notes, accounts, sales or contracts; therefore, Miss. Code Ann. § 75-17-1(1) and Miss. Code Ann. § 75-17-7 did not apply to eminent domain judgments, and also "legal interest" was simple interest, not compounded interest. Dedeaux Util. Co. v. City of Gulfport, 938 So. 2d 838 (Miss. 2006), remanded by 63 So. 3d 514, 2011 Miss. LEXIS 191 (Miss. 2011).

1.1. Constitutionality.

Provision fixing the applicable date for determining due compensation in an eminent domain proceeding as the date that

the complaint was filed rather than the date the property was transferred, Miss. Code Ann. § 11-27-19, was unconstitutional as applied to a private utility that provided service for eight more years after its public takeover began. Dedeaux Util. Co. v. City of Gulfport, 63 So. 3d 514 (Miss. 2011).

6. View of premises.

There was no problem with a jury instruction in an eminent domain matter where the jury was instructed that the land had already been taken under the so-called "quick take law," Miss. Code Ann. § 11-27 -81 and the jury had viewed the property in accordance with Miss. Code Ann. § 11-27-19; the jury was to determine the value of the taking. North Biloxi Dev. Co., L.L.C. v. Miss. Transp. Comm'n, 912 So. 2d 1118 (Miss. Ct. App. 2005).

§ 11-27-37. Right of action for expenses.

JUDICIAL DECISIONS

1. In general.

Trial court erred by awarding a landowner attorney's fees when the court dismissed a quick-take condemnation action because the court erred in dismissing the case. Harrison County Util. Auth. v. Walker, — So. 3d —, 2014 Miss. App. LEXIS 19 (Miss. Ct. App. Jan. 14, 2014).

Owner was not entitled to attorney fees under Miss. Code Ann. § 11-27-37 because he forfeited his principal stake in the disputed property in the eminent domain proceeding and had no right to the interest that accrued on it over the years or to attorney fees. Morley v. Jackson Redevelopment Auth., 874 So. 2d 973 (Miss. 2004).

§ 11-27-43. Erection and maintenance of utility poles and lines; duty of care owed to public.

(1) All companies or associations of persons incorporated or organized for the purposes set forth in Section 11-27-41 are authorized and empowered to erect, place and maintain their posts, wires and conductors along and across any of the public highways, streets or waters and along and across all turnpikes, railroads and canals, and also through any of the public lands, and to do such clearing as may be reasonably necessary for the proper protection, operation and maintenance of such facilities, provided in all cases such authorization shall meet the requirements of the National Electrical Safety Code. The same shall be so constructed and placed as not to be dangerous to persons or property; nor interfere with the common use of such roads, streets, or waters; nor with the use of the wires of other wire-using companies; or more than is necessary with the convenience of any landowner.

(2) The duty of care owed to the public by owners and operators of public utility facilities located adjacent to a highway, road, street or bridge in this state is satisfied when:

(a) With respect to state highways, the public utility facilities comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(b) With respect to roads, streets and bridges that are not part of the state highway system, the public utility facilities located in a public

right-of-way comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(c) With respect to roads, streets and bridges that are not part of the state highway system, the public utility facilities located on private property comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(d) With respect to structures, appurtenances, equipment or appliances whose placement or installation is not subject to the provisions of the National Electrical Safety Code, the public utility facilities comply with the provisions of the standards in effect when the structure, appurtenance, equipment or appliance is placed, installed or located adjacent to any highway, road, street or bridge in this state, whether or not a part of the state highway system.

(3)(a) The owner of a road, street, highway or bridge, which is not itself the owner or operator of a public utility, owes no duty to the public regarding or relating to the placement or location of public utility facilities within or appurtenant to the right-of-way of the road, street, highway or bridge.

(b) The owner of private property, which is not itself the owner or operator of a public utility, owes no duty to the public regarding or relating to the placement or location of public utility facilities on or appurtenant to the private property.

(4) For the purpose of this section, the term "public utility facilities" means pipes, mains, conduits, cables, wires, towers, poles and other structures, equipment or appliances, whether publicly or privately owned, installed or placed adjacent to any roadway by an owner or operator of a public utility facility.

SOURCES: Codes, 1942, § 2749-22; Laws, 1971, ch. 520, § 22; Laws, 2002, ch. 412, § 1, eff from and after July 1, 2002.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected an error in (4). The word "subsection" was changed to "section" so that "For the purpose of this subsection" reads as "For the purpose of this section." The Joint Committee ratified this correction at its August 5, 2008, meeting.

§ 11-27-47. Pipelines.

All companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the state of Mississippi, or natural gas districts, incorporated or organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas, including carbon dioxide or other gaseous substances for use in connection with secondary or tertiary recovery projects located within the state of Mississippi for the enhanced recovery of liquid or gaseous hydrocarbons, or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power

purposes, or for the purpose of constructing, maintaining and operating lines and appliances, for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, are hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipelines and appliances along or across highways, waters, railroads, canals and public lands, above or below ground, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals and public lands.

The board of supervisors of any county through which any such line may pass shall have the power to regulate, within its respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county. All such companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the state of Mississippi or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof.

SOURCES: Codes, 1942, § 2749-24; Laws, 1971, ch. 520, § 24; Laws, 1984, ch 420, § 2, eff from and after passage (approved April 23, 1984).

Editor's Note — This section has been set out to correct a typographical error in the 2004 Replacement Volume 3 by substituting "are hereby empowered" for "and hereby empowered" in the first sentence.

JUDICIAL DECISIONS

1. In general.

Dismissal of an eminent domain proceeding under Miss. Code Ann. § 11-27-15 was properly denied because owners were unable to show that an electric association's taking was not for public use, and any incidental benefit to surrounding landowners did not defeat the taking of the owners' property; the association wanted to construct a power line to supply its customers with adequate voltage. Knight v. S. Miss. Elec. Power Ass'n, 943 So. 2d 81 (Miss. Ct. App. 2006).

§ 11-27-48. Information from Public Service Commission or Federal Energy Regulatory Commission.

No entity empowered under the laws of the State of Mississippi to exercise the power of eminent domain shall be required, as a condition precedent to exercising such power, to obtain from the applicable regulatory agency, whether the Mississippi Public Service Commission or the Federal Energy Regulatory Commission, or any successor agency, any of the following:

(a) A determination that the entity qualifies as one to which the Legislature has granted the power of eminent domain;

(b) A determination that the entity has complied with state law in invoking the statutory power of eminent domain; or

(c) A certificate of public convenience and necessity for the particular taking in question.

However, this section shall not affect or alter in any way the terms and provisions contained in Sections 77-3-13, 77-3-17 and 77-3-21.

SOURCES: Laws, 1997, ch. 453, § 1; Laws, 2007, ch. 483, § 1, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment, in the introductory language, inserted "the applicable regulatory agency, whether" preceding "the Mississippi Public Service Commission" and "or the Federal Energy Regulatory Commission, or any successor agency" thereafter.

RIGHT TO IMMEDIATE POSSESSION

SEC.

§ 11-27-81. Who may exercise right of immediate possession.

The right of immediate possession pursuant to Sections 11-27-81 through 11-27-89, Mississippi Code of 1972, may be exercised only:

(a) By the State Highway Commission for the acquisition of highway rights-of-way only;

(b) By any county or municipality for the purpose of acquiring rights-of-way to connect existing roads and streets to highways constructed or to be constructed by the State Highway Commission;

(c) By any county or municipality for the purpose of acquiring rights-of-way for widening existing roads and streets of such county or municipality; provided, however, that said rights-of-way shall not displace a property owner from his dwelling or place of business;

(d) By the boards of supervisors of any county of this state for the acquisition of highway or road rights-of-way in connection with a state-aid project designated and approved in accordance with Sections 65-9-1 through 65-9-31, Mississippi Code of 1972;

(e) By the Mississippi Wayport Authority for the purposes of acquiring land and easements for the Southeastern United States Wayport Project as authorized by Sections 61-4-1 through 61-4-13, Mississippi Code of 1972;

(f) By any county, municipality or county utility authority created under the Mississippi Gulf Region Utility Act, Section 49-17-701 et seq., for the purpose of acquiring rights-of-way for water, sewer, drainage and other public utility purposes; provided, however, that such acquisition shall not displace a property owner from his dwelling or place of business. A county utility authority should prioritize utilizing easements within ten (10) feet of an existing right-of-way when economically feasible. A county utility authority may not exercise the right to immediate possession under this paragraph after July 1, 2013. Provisions of this paragraph (f) shall not apply to House District 109;

(g) By any county authorized to exercise the power of eminent domain under Section 19-7-41 for the purpose of acquiring land for construction of a federal correctional facility or other federal penal institution;

(h) By the Mississippi Major Economic Impact Authority for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(iv)1 or any facility related to the project as provided in Section 57-75-11(e)(ii);

(i) By the boards of supervisors of any county of this state for the purpose of constructing dams or low-water control structures on lakes or bodies of water under the provisions of Section 19-5-92;

(j) By the board of supervisors of any county of this state for the purpose of acquiring land, property and/or rights-of-way for any project the board of supervisors, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(iv). The board of supervisors of a county may not exercise the right to immediate possession under this paragraph (j) after July 1, 2003;

(k) By a regional economic development alliance created under Section 57-64-1 et seq., for the purpose of acquiring land, property and/or rights-of-way within the project area and necessary for any project such an alliance, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(xxi). An alliance may not exercise the right to immediate possession under this paragraph (k) after July 1, 2012; or

(*l*) By the board of supervisors of any county of this state for the purpose of acquiring or clearing title to real property, property and/or rights-of-way within the project site and necessary for any project such board of supervisors, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(xxii). A county may not exercise the right to immediate possession under this paragraph (*l*) after July 1, 2012.

SOURCES: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1975, ch. 447; Laws, 1987 Ex Sess, ch. 24, § 19; Laws, 1989, ch. 535, § 8; Laws, 1990, ch. 470, § 1; Laws, 1994, ch. 310, § 2; Laws, 2000, 3rd Ex Sess, ch. 1, § 11; Laws, 2001, ch. 476, § 2; Laws, 2007, ch. 303, § 11; Laws, 2007, 1st Ex Sess, ch. 1, § 6; Laws, 2008, 1st Ex Sess, ch. 52, eff August 21, 2008.

Amendment Notes — The first 2007 amendment (ch. 303) added (k); and made minor stylistic changes.

The second 2007 amendment (ch. 1, 1st Ex Sess), added (*l*) and made minor stylistic changes.

The 2008 amendment, in (f), inserted "or county utility authority created under the Mississippi Gulf Region Utility Act, Section 49-17-701 et seq.," and added the last three sentences; substituted "paragraph (j)" for "item (j)" near the end of (j), "paragraph (k)" for "item (k)" near the end of (k), and "paragraph (*l*)" for "item (*l*)" near the end of (*l*); and made minor stylistic changes.

Cross References — General powers and duties of the Mississippi Major Economic Impact Authority, see § 57-75-11.

ATTORNEY GENERAL OPINIONS

There is no authority for the board of commissioners of the Northeast Mississippi Natural Gas District to exercise the right of immediate possession of property pursuant to Section 11-27-81. McElroy, Apr. 11, 2003, A.G. Op. 03-0169

A city may use the quick take provisions of this section to acquire easements for the municipal sewer system in addition to the eminent domain authority of §§ 21-37-47 et seq. Kerby, Sept. 12, 2003, A.G. Op. 03-0467.

A county may use the quick take provisions of this section to acquire a right-of-way for upgrades to the county's water and sewer service to the county-owned industrial park. A finding by the board of supervisors that no property owner will be displaced from his or her dwelling or place of business should be reflected in an order entered upon the board's minutes. O'Donnell, Aug. 13, 2004, A.G. Op. 04-0360.

§ 11-27-83. Institution of proceedings; appraisal of property.

JUDICIAL DECISIONS

1. In general.

Commission failed to meet its burden of proof in establishing the fair market value of land condemned under the "quick take" provisions because it: (1) used sales that were not comparable to the landowner's property, (2) used only one approach to value, and (3) failed to consider the income approach in light of the subject property's income-producing capacity. Burks v. Miss. Transp. Comm'n, 990 So. 2d 200 (Miss. Ct. App. 2008), writ of certiorari denied by 994 So. 2d 186, 2008 Miss. LEXIS 475 (Miss. 2008).

§ 11-27-85. Order granting right to immediate title and immediate entry; deposit.

(1) Upon the filing of the report of the appraiser, the clerk shall within three (3) days mail notice to the parties and the court that the report has been filed. The court shall review the report of the appraiser and shall, after not less than five (5) days' notice thereof to the defendants, enter an order granting to the plaintiff title to the property, less and except all oil, gas and other minerals which may be produced through a well bore, and the right to immediate entry unless, for other cause shown or for uncertainty concerning the immediate public need for such property pursuant to Section 11-27-83, the judge shall determine that such passing of title, and right of entry should be denied. However, no person lawfully occupying real property shall be required to move from a dwelling or to move his business or farm operation without at least ninety (90) days' written notice prior to the date by which such move is required.

(2) Upon entry of said order, the plaintiff may deposit not less than eighty-five percent (85%) of the amount of the compensation and damages as determined by the appraiser with the clerk of the court, and upon so doing, the plaintiff shall be granted title to the property, less and except all oil, gas and other minerals which may be produced through a well bore, and shall have the right to immediate entry to said property. The defendant, or defendants, shall

be entitled to receive the amount so paid to the clerk of the court, which shall be disbursed as their interest may appear, pursuant to order of the court.

(3) Notwithstanding any provisions of subsections (1) and (2) of this section to the contrary, title and immediate possession to real property, including oil, gas and other mineral interests, may be granted under this section to (a) any county authorized to exercise the power of eminent domain under Section 19-7-41 for the purpose of acquiring land for construction of a federal correctional facility or other federal penal institution, (b) the Mississippi Major Economic Impact Authority for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(iv)1 and any facility related to such project, (c) a regional economic development alliance for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(xxi) and any facility related to the project; and (d) any county for the purpose of acquiring or clearing title to real property, property and rights-of-way for a project as defined in Section 57-75-5(f)(xxii).

SOURCES: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1986, ch. 465, § 2; Laws, 1988, ch. 447, § 1; Laws, 1991, ch. 573, § 70; Laws, 1994, ch. 310, § 3; Laws, 2000, 3rd Ex Sess, ch. 1, § 12; Laws, 2007, ch. 303, § 29; Laws, 2007, 1st Ex Sess, ch. 1, § 7, eff from and after passage (approved May 11, 2007.)

Amendment Notes — The first 2007 amendment (ch. 303) added (c) in (3); and made minor stylistic changes.

The second 2007 amendment (ch. 1, 1st Ex Sess) added (d) in (3).

Cross References — Mississippi Major Economic Impact Authority generally, see §§ 57-75-1 et seq.

JUDICIAL DECISIONS

1. In general.

There was no problem with a jury instruction that told the jurors that a deposit of funds for the benefit of the landowner had been made in an eminent domain proceeding; the instruction was no more than a summary of Miss. Code. Ann. § 11-27-85(2). North Biloxi Dev. Co., L.L.C. v. Miss. Transp. Comm'n, 912 So. 2d 1118 (Miss. Ct. App. 2005).

§ 11-27-87. Effect of insufficiency or excess of deposit.

JUDICIAL DECISIONS

1. In general.

Owner was properly awarded eight percent interest from the date the petition to condemn was filed, rather than from the date a law firm improperly filed a lis pendens. Lehman v. Miss. Transp. Comm'n, 127 So. 3d 277 (Miss. Ct. App. 2013), writ of certiorari denied by 127 So. 3d 1115, 2013 Miss. LEXIS 658 (Miss. 2013).

CHAPTER 31

Attachment in Chancery Against Nonresident, Absent or Absconding Debtors

§ 11-31-1. Jurisdiction; debtors.

JUDICIAL DECISIONS

1. Validity.

Inclusion of safeguards to minimize the risk of an erroneous pre-hearing deprivation, coupled with the availability of an immediate post-attachment hearing to dissolve the attachment, met the demands of due process; the Mississippi statute required that the complainant set forth the specific facts supporting his claim and permitted an order of attachment to issue only if the chancellor found the complainant had established a prima facie case demonstrating his right to recover on his claim, the Mississippi statute required that the complainant state specific reasons why his ability to recover on his claim was at risk if the order of attachment was not issued, and attachment was only available if the chancellor found that the complainant's ability to recover could be significantly impaired or impeded without an order of attachment, and the Mississippi procedure mandated that the complainant put up a bond to protect the defendant in the event the attachment was later found to have been wrongful. Performance Drilling Co., LLC v. H & H Welding, LLC, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 32190 (S.D. Miss. Apr. 15, 2009).

§ 11-31-2. Application for order of attachment; determination.

JUDICIAL DECISIONS

2. Validity.

Inclusion of safeguards to minimize the risk of an erroneous pre-hearing deprivation, coupled with the availability of an immediate post-attachment hearing to dissolve the attachment, met the demands of due process; the Mississippi statute required that the complainant set forth the specific facts supporting his claim and permitted an order of attachment to issue only if the chancellor found the complainant had established a prima facie case demonstrating his right to recover on his claim, the Mississippi statute required that the complainant state specific reasons why his ability to recover on his claim was at risk if the order of attachment was not issued, and attachment was only available if the chancellor found that the complainant's ability to recover could be significantly impaired or impeded without an order of attachment, and the Mississippi procedure mandated that the complainant put up a bond to protect the defendant in the event the attachment was later found to have been wrongful. Performance Drilling Co., LLC v. H & H Welding, LLC, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 32190 (S.D. Miss. Apr. 15, 2009).

CHAPTER 35

Garnishment

SEC.

§ 11-35-9. Service.

JUDICIAL DECISIONS

1. In general.

Not only did a circuit court err when it determined that priority of garnishments under Miss. Code Ann. § 11-35-24 was based on service of the writ rather than the filing of the writ but if prior garnishors' services of process on a garnishee were defective, the date of service for each was the day the garnishee waived the defense of insufficient service of process by filing an answer to that garnishor's writ. However, the court could not assume that the garnishee waived service of process in the same order that the prior garnishors' attempted service. Y-D Lumber Co. v. Humphreys County, 2 So. 3d 793 (Miss. Ct. App. 2009).

§ 11-35-23. Nature and effects of garnishment; property affected.

(1) Except for wages, salary or other compensation, all property in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall be bound by and subject to the lien of the judgment, decree or attachment on which the writ shall have been issued. If the garnishee shall surrender such property to the sheriff or other officer serving the writ, the officer shall receive the same and, in case the garnishment issued on a judgment or decree, shall make sale thereof as if levied on by virtue of an execution, and return the money arising therefrom to satisfy the judgment; and if the garnishment issued on an attachment, the officer shall dispose of the property as if it were levied upon by a writ of attachment. And any indebtedness of the garnishee to the defendant, except for wages, salary or other compensation, shall be bound from the time of the service of the writ of garnishment, and be appropriable to the satisfaction of the judgment or decree, or liable to be condemned in the attachment.

(2) The court issuing any writ of garnishment shall show thereon the amount of the claim of the plaintiff and the court costs in the proceedings and should at any time during the pendency of said proceedings in the court a judgment be rendered for a different amount, then the court shall notify the garnishee of the correct amount due by the defendant under said writ.

(3)(a) Except for judgments, liens, attachments, fees or charges owed to the state or its political subdivisions; wages, salary or other compensation in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall not be bound by nor subject to the lien of the judgment, decree or attachment on which the writ shall have been issued when the writ of garnishment is issued on a judgment based upon a claim or debt that is less than One Hundred Dollars ($100.00), excluding court costs.

(b) If the garnishee be indebted or shall become indebted to the defendant for wages, salary or other compensation during the first thirty (30) days after service of a proper writ of garnishment, the garnishee shall pay over to the employee all of such indebtedness, and thereafter, the

garnishee shall retain and the writ shall bind the nonexempt percentage of disposable earnings, as provided by Section 85-3-4, for such period of time as is necessary to accumulate a sum equal to the amount shown on the writ as due, even if such period of time extends beyond the return day of the writ. Unless the court otherwise authorizes the garnishee to make earlier payments or releases and except as otherwise provided in this section, the garnishee shall retain all sums collected pursuant to the writ and make only one (1) payment into court at such time as the total amount shown due on the writ has been accumulated, provided that, at least one (1) payment per year shall be made to the court of the amount that has been withheld during the preceding year. Should the employment of the defendant for any reason be terminated with the garnishee, then the garnishee shall not later than fifteen (15) days after the termination of such employment, report such termination to the court and pay into the court all sums as have been withheld from the defendant's disposable earnings. If the plaintiff in garnishment contest the answer of the garnishee, as now provided by law in such cases, and proves to the court the deficiency or untruth of the garnishee's answer, then the court shall render judgment against the garnishee for such amount as would have been subject to the writ had the said sum not been released to the defendant; provided, however, any garnishee who files a timely and complete answer shall not be liable for any error made in good faith in determining or withholding the amount of wages, salary or other compensation of a defendant which are subject to the writ.

(4) Wages, salaries or other compensation as used in this section shall mean wages, salaries, commissions, bonuses or other compensation paid for employment purposes only.

(5) The circuit clerk may, in his or her discretion, spread on the minutes of the county or circuit court, as the case may be, an instruction that all garnishment defendants shall send all garnishment monies to the attorney of record or in the case where there is more than one (1) attorney of record, then to the first-named attorney of record, and not to the clerk. The payment schedule shall be the same as subsection (3) (b) of this section.

(6) All payments made pursuant to a garnishment issued out of the justice court shall be made directly to the plaintiff or to the plaintiff's attorney as indicated by the plaintiff in his or her suggestion for writ of garnishment. The employer shall notify the court and the plaintiff or the plaintiff's attorney when a judgment is satisfied or when the employee is no longer employed by the employer.

(7) If the plaintiff in a garnishment is the Department of Employment Security, the garnishee shall make monthly payments to the department until such time as the total amount shown due on the writ has been accumulated.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 7 (8); 1857, ch. 61, art. 314; 1871, § 875; 1880, § 1784; 1892, § 2136; 1906, § 2343; Hemingway's 1917, § 1938; 1930, § 1844; 1942, § 2796; Laws, 1981, ch. 469, § 1; Laws, 1997, ch. 533, § 1; Laws, 2000, ch. 497, § 1; Laws, 2004, ch. 475, § 1; Laws, 2007, ch. 606, § 18, eff from and after July 1, 2007.

Amendment Notes — The 2007 amendment, in (3)(b); deleted "the court" following "amount shown on the writ as due" in the first sentence, and inserted "and except as otherwise provided in this section" in the second sentence; and added (7).

ATTORNEY GENERAL OPINIONS

Garnishment proceeds should be sent directly to the plaintiff or his attorney, not to the justice court. Denny, Apr. 29, 2005, A.G. Op. 05-0074.

§ 11-35-24. Multiple garnishments.

JUDICIAL DECISIONS

1. Necessary parties.
2. Priority.

1. Necessary parties.

Circuit court could not fully and completely determine priority of garnishors without first retrying that the creditor join the prior garnishors under Miss. R. Civ. P. 19(a). The prior garnishors had a significant pecuniary interest in the disposition of the creditor's motion to determine priority and the circuit court's subsequent fulfillment of that request. Y-D Lumber Co. v. Humphreys County, 2 So. 3d 793 (Miss. Ct. App. 2009).

2. Priority.

Not only did a circuit court err when it determined that priority of garnishments under Miss. Code Ann. § 11-35-24 was based on service of the writ rather than the filing of the writ but if prior garnishors' services of process on a garnishee were defective, the date of service for each was the day the garnishee waived the defense of insufficient service of process by filing an answer to that garnishor's writ. However, the court could not assume that the garnishee waived service of process in the same order that the prior garnishors' attempted service. Y-D Lumber Co. v. Humphreys County, 2 So. 3d 793 (Miss. Ct. App. 2009).

§ 11-35-31. Garnishee's failure to answer.

JUDICIAL DECISIONS

3. Illustrative cases.

As the "earth movement" endorsement in a contractor's general commercial liability policy excluded from coverage the property damage a homeowner suffered, the insurer had no property in its possession belonging to the contractor; therefore the trial court properly set aside the homeowner's default judgment against the insurer pursuant to Miss. Code Ann. § 11-35-31 and granted the insurer summary judgment on the homeowner's action for a writ of garnishment. Hankins v. Md. Cas. Company/Zurich Am. Ins. Co., 101 So. 3d 645 (Miss. Oct. 4, 2012).

§ 11-35-33. Garnishee may claim exemptions.

ATTORNEY GENERAL OPINIONS

If a garnishee suggests an exemption, the court should send notice to the judgment debtor for a hearing on the exemption; the judgment holder is responsible for prepayment of service of process costs and process from justice court should be

issued to a constable and paid as provided by Section 25-7-27. Shirley, Mar. 14, 2003, A.G. Op. #03-0114.

§ 11-35-47. Contest of garnishee's answer by defendant.

JUDICIAL DECISIONS

1. In general.

Circuit court had authority to add a former husband to the garnishment proceeding between his former wife and his employer because the husband possessed a sufficient interest to be joined; the husband's personal property was under the employer's control, and he asserted that the wife obtained title and possession to that property through fraudulent misrepresentation. Cooper v. Estate of Gatwood, 119 So. 3d 1031 (Miss. 2013).

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